

# NAVAL POSTGRADUATE SCHOOL MONTEREY, CALIFORNIA



## THESIS

### CHANGES AND TRENDS IN SMALL DISADVANTAGED BUSINESS (SDB) PROGRAMS

by

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December 1996

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**CHANGES AND TRENDS IN SMALL  
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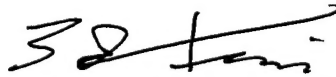
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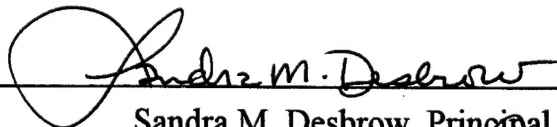
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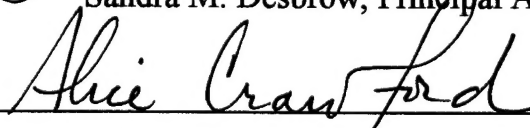


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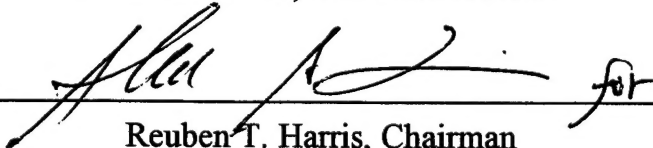
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## ABSTRACT

Since the late 1960s, it has been the policy of the Federal Government to support the development of small disadvantaged businesses (SDBs) owned and controlled by minorities and women. However, as a result of the current controversy over the proper role of affirmative action and the recent Supreme Court's landmark decision in the *Adarand Constructors, Inc. v. Peña*, which challenged a Federal program that provided cash bonuses to prime contractors for awarding subcontracts to minority-owned businesses, Federal SDB set-aside programs are facing uncertain future. Both the Clinton Administration and 104th Congress are currently reviewing the Federal affirmative action programs and have proposed various legislative proposals and programs that would meet the constitutional standards set forth in the *Adarand* decision. One of the objectives of this thesis is to analyze the major Supreme Court decisions, currently ongoing challenges to set-aside programs and political environment that have had a profound influence in shaping the Federal Government's SDB programs. This research also analyzes the latest legislative proposals and programs that are being developed to withstand the standards set forth in *Adarand* case. This study recommends a consolidated single piece of legislative proposal that can best serve the public in promoting small disadvantaged businesses.



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## I. INTRODUCTION

### A. GENERAL

Small Disadvantaged Businesses (SDBs) are statutorily defined as small businesses that are owned and controlled by socially and economically disadvantaged individuals who have been subjected to racial or ethnic prejudice or cultural bias and who have limited capital and credit opportunities. Since the late 1960s, it has been the policy of the Federal Government to support the development of SDBs owned and controlled by minorities and women (Committee, 1995, p. 608). However, as a result of the current controversy over the proper role of affirmative action in such areas as employment, education and contracting, Federal programs for minority and women-owned businesses are facing an uncertain future and are currently under review by both the Clinton Administration and the 104th Congress. Additionally, the recent Supreme Court decision in the *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. at 2117 (1995), which challenged a Federal Program that provided cash bonuses to prime contractors for awarding subcontracts to minority-owned businesses, has had a profound influence on all race-conscious Governmental programs. Although an intricate pattern of Federal statutes and regulations designed to promote small businesses owned by minorities and women still remain largely intact, many of the exclusive set-aside programs for minorities are facing severe challenges for not meeting constitutional standards and Supreme Court's interpretation. (Wekstein, 1995, pp. 19-22)

Until October 1995, Department of Defense (DoD) was allowed to achieve a five-percent mandated SDB goal, separately in prime and subcontracts, by using the combination of the following three SDB programs, as well as using the traditional "direct" small business procurement program: (1) DoD's SDB Set-aside or otherwise called "rule of two" program; (2) Small Business Administration's 8(a) Program; and (3) SDB Price Evaluation Preference program or otherwise called "1207 Program" (which gives bid preference to SDBs by marking up non-SDB bids by ten percent) (Stephanopoulos, 1995, p.61). Through the active use of a combination of these programs, DoD has been able to gain substantial ground in SDB contracting in the past decade, meeting the mandated five-percent SDB goal for the first time in 1993 since the implementation of DoD's SDB set-aside program in 1988 (Gill, 1995, p.1). However, as a result of *Adarand* Supreme Court decision, DoD's SDB set-aside program (so called "rule of two") has been indefinitely suspended as of 23 October 1995 (USA Today, 1996, p. 31). Nevertheless, the requirement to achieve DoD's five-percent SDB goal under the Section 15(g)(1) of Small Business Act is still intact, therefore, requiring extraordinary effort and creativity on behalf of procuring activities to continue to meet the five-percent SDB goal.

As a result of the suspension of the "rule of two" program, procuring agencies are encouraged to use more of the SBA's 8(a) set-aside program in order to make up for the lost ground (Kaminsky, 1996). However, SBA is already burdened with a heavy workload and, moreover, four contract protests, challenging the constitutionality of the 8(a) Program, have already been filed since the Supreme Court's decision on the *Adarand*

case. Therefore, it is most likely that the 8(a) Program, the largest Federal set-aside program, will continue to be subjected to the test/definition of “narrowly defined,” “strict scrutiny” and “compelling interest” that is set forth in the *Adarand* decision.

In view of ongoing court cases that challenge the constitutionality of set-aside programs, every regulation and policy proposal will have to be reevaluated to be able to withstand “strict scrutiny.” New DoD programs and policy proposals that can accommodate the changing courts’ view, and at the same time preserve SDBs, are being proposed. However, any sudden radical reform or abolishment of SDB programs is likely to have a profound impact on all future Federal procurement and may result in an undesirable and irreversible socio-political imbalance. Consequently, because of the political sensitivity of the subject matter, it is expected that pivotal decisions will not be made until after the November 1996 Presidential election.

## **B. OBJECTIVE OF THE RESEARCH**

This research effort concentrates on the analysis of Supreme Court decisions and current court cases that had a profound influence on Small Disadvantaged Businesses (SDBs) set-aside programs and in shaping the latest policy changes. This research also evaluates the political environment, the latest legislative proposals and new programs that are being proposed to satisfy the constitutionality and yet preserve SDBs.

## **C. RESEARCH QUESTIONS**

1. What are the origin, historical background, evolvement and definitions related to the Small Disadvantaged Business (SDB) programs?

2. What are the major Supreme Court decisions and ensuing interpretations that have had a profound impact in shaping the latest policies on SDB programs?

3. What lawsuits challenging the constitutionality of SDB set-aside programs have been filed since the Supreme Court's landmark decision in *Adarand Constructors, Inc. v. Peña*?

4. What attempts have been made to amend/abolish set-aside programs under the dynamics of socio-political trend and post-*Adarand* Supreme Court decision?

5. What post-*Adarand* policy adjustments and programs have been proposed?

6. What is the current socio-political climate surrounding the SDB programs?

7. Do currently proposed policies and programs comply with the interpretation and standards set forth in the *Adarand* decision? If not, what changes and adjustments should be recommended to enhance the current proposals?

#### **D. SCOPE OF THE STUDY**

Many recent journals, magazine and newspaper articles, and other data are available on various subjects related to this study. Some of the latest information and data were obtained from the U.S. House Small Business Committee. However, comprehensive written material that incorporates the overall flavor that is intended in this study is yet to be found. The data that would help analyze the ultimate impact of policies and programs that are currently being proposed/implemented are not available at the time of this writing, therefore, it is not intended for this study to expound on the eventual outcome that will result from the proposed programs. Nevertheless, a reasonable prediction of the impact

on the SDB programs can be deduced based on the analysis of historical trends and patterns of issues (i.e., court decisions and their interpretation, socio-political atmosphere, and past statistics) surrounding SDB programs. The ultimate intention of this study is to provide a handy and yet comprehensive up-to-date reference, which compiles and organizes widely scattered and complex webs of information and changes that encompass the SDB programs, to interested readers and also to assist in formulating and shaping the future policies pertaining to SDB programs.

#### **E. METHODOLOGY**

A comprehensive search of literature, journal, magazine, newspaper articles, General Accounting Office (GAO) reports and Supreme Court cases are the basis of this research. The basis for the remainder of the research comes from the comprehensive review and analysis of the ongoing court cases, newly proposed programs and policy adjustments, as well as from phone conversations with subject matter experts. Based on the phone conversation conducted with two subject matter experts, it became known that the pertinent up-to-date data and statistics will not be made available until about a year or more after the policy changes have been implemented and executed (Hathway & Bowlan, 1996, Phone). Nevertheless, in the absence of most current data/statistics, it is still possible to derive a reasonable prediction, to project impact into the future and to make policy recommendations based on the comprehensive analysis of historical trends and patterns of issues surrounding the programs. Due to the ever-changing nature of this subject, information gathering was cut off on 15 July 1996 to facilitate the analysis,

conclusions, and recommendations.

## **F. ORGANIZATION OF THE STUDY**

Chapter I was comprised of a general introduction, objective, scope, methodology and organization of the study. Chapter II expounds on the first research question through the introduction of the historical background, definition of SDB and evolvement of various SDB programs. Chapter III elaborates on the second research question by presenting major Supreme Court decisions and ensuing interpretations that had profound influence in shaping the latest policies on SDB programs. Chapter IV responds to the third research question by introducing the post-*Adarand* cases challenging the constitutionality of the Small Business Administration's 8(a) Program and other SDB set-aside programs. Chapter V presents the post-*Adarand* political pressure and legislative initiatives to amend or abolish set-aside programs; in the process, it answers the fourth research question. Chapter VI answers the fifth research question by presenting the post-*Adarand* policy adjustments and programs that have been proposed in attempts to comply with the interpretation and standards set forth by the Supreme Court. Chapter VII answers the sixth research question by analyzing the socio-political climate surrounding SDB programs. Chapter VIII responds to the last research question by recommending policy/program adjustments based on an analysis of currently proposed policies and programs.

## **II. BACKGROUND AND EVOLVEMENT OF SDB PROGRAMS**

### **A. HISTORICAL BACKGROUND**

Since the late 1960s, it has been the policy of the Federal Government to assist small businesses owned and controlled by minorities to have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency and to become fully competitive and viable business concerns (Committee, 1995, p.608). In 1979, businesses owned by women were added to this effort. To achieve these policy objectives, Federal assistance has been provided in various forms including preferential treatment in obtaining procurement contracts and subcontracts, management and technical assistance, grants for education and training, surety bonding assistance and loans and loan guarantees. (Eddy, 1995, p. 1)

As a result of the current controversy over the proper role of affirmative action in such areas as employment, education and contracting, both the Clinton Administration and the 104th Congress are currently reviewing the Federal programs for minority and women-owned businesses (Eddy, 1995, p. 2). Additionally, the recent Supreme Court decision in the *Adarand Constructors, Inc. v. Peña*, which challenged a Federal program that gave cash bonuses to prime contractors for awarding subcontracts to minority-owned businesses, has had a profound influence on all race-conscious Governmental programs. Although an intricate pattern of Federal statutes and regulations designed to promote small businesses owned by minorities and women remain largely intact, many of the

exclusive set-aside programs for minorities are facing severe challenges for not complying with constitutional standards and interpretation. (Ireton, Sep. 1995, pp. 19-22)

Both the Small Business Act, and the Small Business Administration (SBA) which it created, stand as key components of the Federal Government's attempts to enhance the role of small businesses in the American economy. The earliest statutory basis for Federal aid to *economically disadvantaged* entrepreneurs appeared in the 1967 amendments to the Economic Opportunity Act of 1964, which, in part, directed the SBA to assist small businesses owned by low-income individuals. (Eddy, 1995, p.2)

During the 1967-69 period of urban unrest, the Small Business Act's unutilized section 8(a), which authorized the SBA to grant Federal procurement contracts to small businesses, was administratively reformulated to funnel Federal procurement contracts to *minority-owned* small businesses. SBA's administrative decision to turn section 8(a) into a minority business program eventually gained statutory basis with the passage in 1978 of Public Law 95-507. (Eddy, 1995, p. 2)

Begun by the Johnson Administration, the section 8(a) Program received greater support during the Presidential campaign of 1968 when candidate Richard Nixon advanced the concept of "black capitalism." The promotion of business ownership opportunities for Blacks was widely seen as a desirable way to alleviate the problem of the unemployed minorities. With bipartisan support, the 8(a) program grew rapidly and in recent years has accounted for approximately 40 percent of the total value of contract awards to minority-owned firms. (Eddy, 1995, p. 2)



During the 1980s, Congress repeatedly examined racial discrimination in Federal contracting and consistently found that it persisted. In 1987, evidence compiled by Congress showed that little progress had been made in overcoming discriminatory barriers to minority business success: only six percent of all firms are owned by minorities; less than two percent of minorities own businesses while the comparable percentage for non-minorities is more than six percent; and the averages of receipts per minority firm are less than ten percent the average receipts for all businesses. (Stephanopoulos, 1995, p. 56)

The data regarding Federal procurement revealed a similar picture. In 1986, total prime contracts approached \$185 billion, yet minority business received only \$5 billion in prime contracts, or about 2.7 percent of the prime contract dollar. (Stephanopoulos, 1995, p. 57)

## **B. AFFIRMATIVE ACTION**

During the period from 1954 to 1978, the nation made great strides in resolving the dilemma of race relations in America. This naturally had the effect of addressing employment discrimination and examining methods for achieving its elimination. This also required an examination of the overall effect centuries of discrimination had on the employment opportunities of African Americans. Furthermore, an examination of the effect of existent discrimination was necessary. In response to these questions, the Government issued laws both prohibiting discrimination in employment and providing that some type of remedial program was necessary. Affirmative action programs benefiting those recipients of past and present discrimination were borne out of this atmosphere.

(Brody, 1996, p. 5)

To address the inequities of employment discrimination, President Kennedy issued Executive Order 10925, which prohibited discrimination and required contractors to pledge to take affirmative action to ensure that applicants for employment are considered without regard to race. The significance of the order was to eliminate racial discrimination against African Americans by those entities receiving Government contracts. (Brody, 1995, p. 6)

Congress strengthened Executive Order 10925 by incorporating it into titles VI and VII of the Civil Rights Act of 1964, thereby providing the legislative basis for equal employment opportunity laws and affirmative action programs. The United States Senate explicitly noted that the act included the affirmative action program set forth in executive Order 10925 in the administration provisions of Title VII. Congress thus illustrated its intent that Title VII would bring about the elimination of discrimination against African Americans. The overall effect of passing Title VI and Title VII was congressional recognition of Executive Order 10925. (Brody, 1995, p. 6)

Affirmative action dates to the 1960s, and since the 1970s, various measures have been introduced in Congress to strengthen or restrict affirmative action policies and programs. It emanates from Titles VI and VII of the Civil Rights Act of 1964, which were meant to alleviate discrimination against minorities and women (Brody, 1995, p. 1). The U.S. Commission on Civil Rights has defined “affirmative action” to encompass “any measure, beyond simple termination of a discriminatory practice, adopted to correct or

compensate for past or present discrimination or to prevent discrimination from recurring in the future.” Affirmative action operates in areas including employment, public contracting, education and housing. In 1995 and 1996, however, the debate over affirmative action has been focused primarily on employment and contracting programs. (Brody, 1995, p. 2 )

### **C. THE FOURTEENTH AMENDMENT**

The Fourteenth Amendment was enacted primarily to guarantee the constitutionality of the race-conscious measures established in the Freedmen’s Bureau Act, which were subsequently affirmed through the Civil Rights Act of 1866, and to address the problems of racism during the post Civil War period. In fact, Congress debated the Fourteenth Amendment and the 1866 Freedmen’s Bureau Bill simultaneously. This historical fact illustrates that the two provisions are inseparable. The reasoning behind one is also the reasoning behind the other. In the case of both, the protection of the equal rights of African Americans was of primary focus. The Fourteenth Amendment was meant to validate race-conscious policies found in the Civil Rights Act of 1866. (Brody, 1995, pp. 2-3)

Amending the Constitution became necessary because of President Andrew Johnson’s decision to veto the original versions of the 1866 Freedmen’s Bureau Act and the Civil Rights Act of 1866. In both cases the President made classic conservative arguments. Johnson claimed those providing special provisions to former slaves while not providing the same provisions for unfortunate whites was unfair. In his veto of the 1866

Civil Rights Act, President Johnson explained that, in his mind, the distinction between race in the bill would benefit African Americans while unfairly disadvantaging whites. This rhetoric is somewhat similar to the rhetoric currently used by many of those arguing against present day affirmative action programs. (Brody, 1995, p. 3)

In contrast, proponents of the 1866 act supported race-conscious measures because such action directly assisted those who had been discriminated against. The proponents openly acknowledged race as a factor and felt that because it had been a factor in the enslavement and continued discrimination against the ex-slaves, it could now be taken into account in fashioning a remedy for nearly 300 years of inequality. Therefore, Congress overrode President Johnson's veto of the Civil Rights Act of 1866, and subsequently passed a new Freedmen's Bureau Bill that was even more race specific than the previously vetoed Freedmen's Bureau legislation. Johnson also vetoed the 1866 Freedmen's Bureau Act, but once again his veto was subsequently overridden. (Brody, 1995, p. 3)

The Fourteenth Amendment was enacted by the Congress during the same debates and discussions concerning the effective provision of remedies for past and present discrimination for former slaves. Therefore, the Fourteenth Amendment needs to be analyzed in this context, which acknowledges the effects of discrimination on African Americans, and needs to be recognized as designed to guarantee the constitutionality of race-conscious measures employed to improve their situation. (Brody, 1995, p. 3)

Under Section 706(g) of Title VII of the 1964 Civil Rights Act and the Fourteenth Amendment, Federal courts have the authority to order public and private employers to implement race or gender-conscious affirmative action programs. This remedy is provided only in the most extraordinary circumstances, and only when the remedy is narrowly tailored to minimize the burden on white employees. (Brody, 1995, p. 12)

#### **D. DEFINITION OF SMALL DISADVANTAGED BUSINESS (SDB)**

The definitions in Federal law of Small Disadvantaged Businesses and women-owned businesses are not uniform. For example, in some statutes women are included within the definition of *socially disadvantaged* individuals, but in others they are not. Some statutes do not define the terms at all. Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) does, however, contain a comprehensive definition of *socially and economically disadvantaged* small businesses that apply to Small Business Administration's programs, and that definition is incorporated by reference into many other statutes. (Eddy, 1995, p. 3)

Section 8(d) of the Small Business Act defines a *Small Disadvantaged Business* (SDB) as a small business concern that is at least 51 percent unconditionally owned by a citizen or citizens of the United States who are both *socially and economically disadvantaged*; or, in the case of a publicly owned business, at least 51 percent of the stock is unconditionally owned by *socially and economically disadvantaged* citizens. The daily management and operation of the business concern must also be controlled by an owner or owners who are *socially and economically disadvantaged*. (Committee, 1995,

p. 609)

*Socially disadvantaged* individuals are defined by section 8(a) of the Small Business Act as persons who have been subjected to racial or ethnic or cultural bias because of their identity as a member of a group without regard to their individual qualities (Committee, 1995, p. 594). Section 8(d) of the Small Business Act states the *social disadvantage* of such individuals must stem from circumstances beyond their control. In the absence of evidence to the contrary, Black Americans, Hispanic Americans, Native Americans and Asian-Pacific Americans, Subcontinent-Asian Americans are automatically presumed by statute to be socially disadvantaged (Committee, 1995, p. 609). Specific breakdowns of these minority groups are provided in the definition section of Subpart 19.001 of the Federal Acquisition Regulation.

*Economically disadvantaged* individuals are defined by section 8(a) of the Small Business Act as *socially disadvantaged* individuals whose ability to compete in the free enterprise system has been impaired due to “diminished capital and credit opportunities,” as compared to others in the same business area who are not socially disadvantaged. In determining the degree of “diminished credit and capital opportunities,” the Small Business Administration must consider, but not be limited to, the assets and net worth of such socially disadvantaged individuals. (Committee, 1995, p. 594)

According to section 8(d) of the Small Business Act, the term “small business concern owned and controlled by women” implies that at least 51 percent of the business is owned by one or more women; or, in the case of any publicly owned business, at least

51 percent of the stock of which is owned by one or more women. Additionally, the management and daily business operations must be controlled by one or more women.

(Committee, 1995, p. 609)

In *Adarand* case, the definition of *socially disadvantaged* appears to be one of the focal points of controversy, since predesignated minority groups are given automatic preferential treatment as being *socially disadvantaged* without first giving regards to any type of objective standard or individual economic status. Despite the controversy, any serious effort to revise this definition (i.e., to remove the racial and ethnic connotation) is yet to be seen.

Several programmatic changes are, nevertheless, being discussed by SBA to develop more objective standards for determining *economic disadvantage*. Eligibility factors being considered include: (1) personal net worth, including net worth of spouses; (2) total assets, including value of residence, net worth of the concern and spouse's assets; and (3) income, including income of the spouse if derived from the applicant or participant. (Ireton, Apr. 1996, p. 39)

#### **E. SMALL BUSINESS SIZE STANDARD**

Small Business Administration (SBA) acts as the Government agency that administers the Small Business Act, and in that capacity, SBA applies a variety of size standards to different industries in defining "small business concern." In order to qualify as "small business concern," a disadvantaged business must meet the size standard established by regulation for the firm's primary Standard Industrial Classification (SIC)

Code. The SIC Code size standards, which are based upon either the firm's maximum number of employees or its amount of annual receipts, can be found in the section 121.601 of the "Small Business Size Regulations & Size Standards," 13 Code of Federal Regulations Part 121 (13 CFR, 1993, p. 348-349). All contracts for supplies or services that have an anticipated value greater than \$2,500 but not greater than \$100,000 are also reserved exclusively for small business concerns (FAR, 1996, Subpart 13.105).

Two years of effort to develop a new North American Industry Classification System (NAICS), which is being proposed to replace the current SIC, is nearing completion. The new NAICS structure provides common industry definitions for Canada, Mexico and the United States to cover economic analyses of all three countries (Ireton, Apr. 1996, p. 39).

#### **F. WOMEN-OWNED BUSINESS ENTERPRISE (WBE)**

Intense Federal efforts to directly support women business owners began in 1979 with the issuance of President Carter's Executive Order 12138, which is designed to minimize discrimination against women entrepreneurs and to create programs responsive to their special needs, including assistance in Federal procurement. The Federal promotion of women-owned business enterprises (WBEs) was given statutory authority with the enactment of the Women's Business Ownership Act of 1988. As a result, an Office of Women's Business Ownership was established within the Small Business administration. This office negotiates annually with each Federal agency a percentage goal for the awarding of Federal prime procurement contracts to WBEs. This effort resulted in



Federal prime contracts and subcontracts worth \$5.0 billion awarded to WBEs in Fiscal Year 1994 (2.2 percent of total Federal prime contracts and subcontracts awarded in that year), which is up from \$4.6 billion and 2.0 percent in Fiscal Year 1993. (Eddy, 1995, p. 4)

The Federal promotion of WBEs was given statutory authority with the enactment of the Women's Business Ownership Act of 1988 (Public Law 100-533; 102 Stat. 2689). It established a new loan guarantee program administered by SBA to guarantee commercial bank loans of up to \$450,000 to small firms (not just women-owned firms), created a National Women's Business Council to monitor the progress of Federal, State and local governments in assisting WBEs and authorized grants to private organizations to provide management and technical assistance to WBEs. (Eddy, 1995, p. 4)

Annual procurement goals for WBEs continued to be negotiated between Federal agencies and the SBA under the authority of Executive Order 12138 until enactment of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355; 108 Stat. 3374). This law amended Section 15 of the Small Business Act (15 U.S.C. 644) to establish a five-percent annual goal for WBE participation in Federal prime contracts and subcontracts (Eddy, 1995, p. 5). Specifically, Section 15 of the Small Business Act states that the Government-wide goal for participation by small business concerns owned and controlled by women shall be established at not less than five percent of the total values of all prime contract and subcontract awards for each fiscal year (Committee, 1995, p. 633).

Measures to further strengthen the Federal Government's promotion of WBEs

were contained in the Small Business Administration Reauthorization and Amendments Act of 1994 (Public Law 103-403; 108 Stat. 4175). This law codified the SBA's Office of Women's Business Ownership, established an Inter-agency committee on Women's Business Enterprise to recommend policies to promote the development of WBEs and restructured the National Women's Business Council as a private advisory panel to the Inter-agency Committee, the SBA and Congress. The committee and council held their first meetings simultaneously at the White House in February 1995. (Eddy, 1995, p. 5)

#### **G. MBE CONTRACTING AND SUBCONTRACTING GOALS**

The 1978 enactment of Public Law 95-507 (92 Stat. 1757) required all Federal agencies to set percentage goals for the awarding of procurement contracts to small minority-owned businesses. Section 15(g) of the Small Business Act specifies that these goals are established annually by consultations between each Federal agency and the SBA (Committee, 1995, p. 633). The same law also amended section 8(d) of the Small Business Act to require prime contractors with Federal contracts that exceed \$1,000,000 for the construction of any public facility, or \$500,000 in the case of all other contracts, to establish under "subcontracting plans" separate percentage goals for the utilization of small business concerns, SDB concerns and women-owned small business concerns as subcontractors whenever subcontracting opportunities are present (FAR, 1996, Subpart 19.704). In Fiscal Year (FY) 1993, \$13.35 billion of Federal procurement funds were expended through MBEs. This sum amounted to 7.3 percent of the total Federal procurement (i.e., for prime and subcontracts combined), up from 6.4 percent (\$11.74

billion) in FY 1992 and 5.4 percent (\$10.07 billion) in FY 1991. (Eddy, 1995, p. 7)

The procedures established by Public Law 95-507 for determining annual MBE procurement goals were changed and strengthened in 1988 by a provision of Public Law 100-656 requiring the President to establish a *Government-wide* procurement goal for SDBs at not less than five percent of the total value of all *prime contract* and *subcontract* awards, respectively, for each fiscal year. The goal for all small businesses, including those that are minority-owned, is set at not less than 20 percent of the total value of all *prime contract* awards for each fiscal year (Committee, 1995, p. 633). Specifically, Title 10, U.S.C. 2322 of the Small Business Act set forth a goal of five percent to be the objective of the Department of Defense, the Coast Guard and the National Aeronautics and Space Administration in each fiscal year for the total combined amount obligated for contracts and subcontracts entered into with: (1) small business concerns owned and controlled by socially and economically disadvantaged individuals; (2) historically Black colleges and universities (HBCU); and (3) minority institutions (Committee, 1995, p. 117). This program expires in FY 2000 (Gill, 1995, p. 1). The five-percent SDB goal, which applies separately to prime contracts and subcontracts, went into effect at the beginning of FY 1990 and has probably helped to further expand the share of Federal contracting and subcontracting dollars going to MBEs despite declining Federal procurement budgets (Eddy, 1995, p. 7).

In an effort to comply with the Presidential directives, DoD enacted two SDB programs: (1) DoD's SDB Set-aside ("rule of two") Program, which sets aside contracts

for exclusive bidding by SDBs when at least two capable SDBs are expected to bid on a contract; and (2) “price evaluation preference,” which can be used in the case of “unrestricted competitions” to give price preference of up to ten percent to SDBs (This is achieved by increasing the offers of all non-SDBs by the predetermined percentage. The winning bid however, cannot exceed fair market price). (Eddy, 1995, pp. 7-8)

This Government-wide affirmative action effort for minority-owned businesses was further strengthened by the Federal Acquisition Streamlining Act of 1994, which reiterated the five-percent SDB goal and extended to civilian agencies two devices previously authorized for use by the DoD in its SDB program (i.e., “rule of two” and “price evaluation preference” programs) (Eddy, 1995, p. 8). Proposed regulations to implement this new provision of Federal procurement law were published in the Federal Register on January 6, 1995, but apparently as a result of the *Adarand* decision, never materialized.

#### **H. ESTABLISHMENT OF OSDBU**

Public Law 95-507, which can be considered the cornerstone of the Federal SDB programs, amended the Small Business Act to require each Federal agency with procurement powers to create an Office of Small and Disadvantaged Business Utilization (OSDBU). These offices are responsible for each agency’s contracting and development programs for small, disadvantaged and women-owned businesses, and are responsible for coordinating these programs with the SBA. This implies that virtually every Federal agency has procurement programs for MBEs and WBEs. Minority and women entrepreneurs wanting to do business with a specific Federal agency can contact the

agency's OSDBU for information on contracting and subcontracting opportunities. (Eddy, 1995, p. 7)

## **I. SBA'S 8(A) PROGRAM**

Named from section 8(a) of the Small Business Act from which it derives its authority, the Small Business Administration's 8(a) Program enables the SBA to enter into prime contracts with other Federal departments and agencies for their procurement needs. The SBA then subcontracts the actual performance of the work to the limited number of economically and socially disadvantaged businesses that are certified by the SBA for participation in the program (13 CFR, 1995, p. 1). During Fiscal Year 1994, a total of 5,646 businesses participated in the 8(a) Program. These firms were awarded Federal procurement contracts worth about \$5.5 billion, approximately 52 percent of the total Federal prime contracts awarded to SDBs (Stephanopoulos, 1995, p. 66). The five largest areas of contracting activity were engineering services, general contractors, physical and biological research, computer services, and dredging and surface cleanup activities (SBA, 1994, p. 1). All Federal departments and major independent agencies participate in the 8(a) Program (Eddy, 1995, p. 9).

For purposes of program enrollment, African Americans, Hispanic Americans, Native Americans and Asian Americans are presumed to be *socially disadvantaged*. Others, such as women or disabled persons who do not belong to the presumptively disadvantaged minority groups, can individually establish social disadvantage stemming from color, national origin, gender, physical disability, long-term residence in an

environment isolated from the mainstream of American society or other similar circumstances. There are, however, few such persons who have participated in the 8(a) Program. (Eddy, 1995, p. 9)

For the purposes of the 8(a) Program, *economically disadvantaged* individuals are *socially disadvantaged* individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities. In determining economic disadvantage for purposes of 8(a) Program eligibility, SBA compares the firm's business and financial profile with profiles of businesses in the same or similar lines of business that are not owned and controlled by socially and economically disadvantaged individuals. In determining the degree of diminished credit and capital opportunities, SBA considers factors relating both to the firm and to the individual. An individual whose personal net worth exceeds \$250,000 (excluding their ownership interests in the firm and the equity in their primary places of residence) is not considered economically disadvantaged for purposes of 8(a) Program entry. (13 CFR, 1995, p. 7)

Section 8(a) manufacturing contracts over \$5 million and other contracts over \$3 million must now be awarded on the basis of competition between eligible 8(a) firms. For contracts less than \$3 million, they are awarded under a noncompetitive sole source situation. (Final, 1993, p. 56)

A firm must demonstrate that it has a potential for success and that it has been in business in the primary industry classification in which it seeks 8(a) certification for two full years prior to the date of its 8(a) application by submitting income tax returns showing

revenues for each of the two previous years. To determine whether a firm has the potential for success, SBA evaluates technical and managerial experience and competency of the individuals upon whom eligibility is based, the financial capacity of the applicant firm and the firm's record of performance on previous Federal and private sector contracts in the primary industry in which the firm is seeking 8(a) certification.

The 8(a) Program is designed as a "business development program," and certified SDB firms are required to develop comprehensive business plans with specific business targets, objectives and goals. Program participation is limited to a period of nine years. As companies move through the program, they are required to obtain a progressively larger share of their revenues from non-8(a) sources in order to enhance their chances of survival after graduating from the program. Typically, during the first four of nine years (developmental phase), a firm may have any mix of 8(a) and commercial work; however, during the remaining five years (transitional phase), companies are encouraged to reduce their ratio of 8(a) contracts to non-8(a) work as they seek to operate in the free market. (Eddy, 1995, pp. 9-10)

In order to meet these objectives, section 7(j) of the Small Business Act requires the SBA to provide management and technical assistance to 8(a) firms. Assistance is provided in such areas as loan packaging, financial counseling, accounting and bookkeeping, marketing and management. There are also provisions for surety bonding assistance and for advance payments to help in meeting financial requirements necessary to the performance of a contract. (Eddy, 1995, p. 10)

## **J. DoD INITIATIVES IN SDB PROGRAMS**

Section 1207 of the National Defense Authorization Act of 1987 (Public Law 99-661; 100 Stat. 3973) established a goal, for fiscal years 1987 through 1989, of awarding five percent of the total value of DoD procurement contracts to minority firms, historically Black colleges and universities and other minority institutions. Repeatedly reauthorized, this requirement was extended for seven years, through FY 2000, by the National Defense Authorization Act for Fiscal Year 1993 (Public Law 102-484; 106 Stat. 2442). (Eddy, 1995, p. 11)

In pursuit of the five-percent goal, DoD procurement agencies have set aside a portion of their procurement contracts for exclusive bidding by SDBs (i.e., using DoD's "rule of two" program). To achieve a five-percent goal, DoD also participates in the 8(a) Program and is by far the largest participant of the program. Moreover, using SDB "price evaluation preference" program (so called "1207 Program"), SDBs can receive a price evaluation preference of up to ten percent when competing against non-SDBs in open solicitations and, unlike with civilian agencies, winning bids with DoD are allowed to exceed fair market price. In addition, major DoD prime contractors are required to submit plans and goals for subcontracting with SDB concerns. DoD procurement funds going to SDBs in FY 1994 (i.e., including direct contracts, subcontracts, 8(a) contracts, price evaluation preference and "rule of two") amounted to nearly \$8.4 billion, or 5.3 percent of total DoD procurement dollars, up from 5.0 percent in FY 1992, when the five-percent goal was first achieved. (Eddy, 1995, p. 11)



Unlike SBA's section 8(a) Program and Department of Transportation's Disadvantaged Business Enterprise (DBE) program, DoD's "rule of two" and "price evaluation preference" programs have no certification requirements. Non-minority women are not presumed to be disadvantaged for purposes of Section 1207 (Eddy, 1995, p. 12). Over 60 percent of DoD's contracting with SDBs has occurred through either this "rule of two" set-aside or through the 8(a) Program; "price evaluation preference" has been little-used in recent years because regulations require that the "rule-of two" be used whenever possible (Stephanopoulos, 1995, p. 61).

#### **K. MENTOR-PROTÉGÉ PILOT PROGRAM**

To encourage DoD contractors to increase SDB participation in subcontracting, Congress in 1990 created the Mentor-Protégé Pilot Program. Mandated by section 831 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510), the program authorizes prime contractors (mentors) to award noncompetitive subcontracts to SDBs (proteges) and to provide loans or make other investments in protégé firms. Mentors receive incentives in the form of reimbursements for their assistance to proteges and earn credit toward their SDB subcontracting plan goals. In this voluntary program, mentors are responsible for selecting their proteges, subject to the approval of DoD's Office of Small and Disadvantaged Business Utilization, which oversees the program. (DoD 4205/1-G, 1994, pp. 8-9)

## **L. DEPARTMENT OF TRANSPORTATION INITIATIVES**

The Surface Transportation and Uniform Relocation Assistance Act (STURAA) of 1987 required the Department of Transportation (DOT) to expend not less than ten percent of Federal highway and transit funds with disadvantaged business enterprises. This requirement was reauthorized by the Intermodal Surface Transportation Efficiency Act of 1991. STURAA was one of the first pieces of Federal legislation to include women in the definition of *socially disadvantaged* individuals. Prior to its passage, DOT maintained separate programs and goals for MBEs and WBEs. (Eddy, 1995, p. 10)

Federal transportation funds are distributed by DOT through State departments of transportation and State and local mass transit agencies. These agencies are required to adopt specific annual goals for Disadvantaged Business Enterprise (DBE) participation in their highway and transit contracts. The State and local transportation agencies are also responsible for establishing certification procedures for their DBE programs, although all section 8(a) firms are automatically certified. (Eddy, 1995, p. 10)

## **M. LABOR SURPLUS AREA PREFERENCES**

The Government has established a system of contracting preferences (primarily contract set-asides and subcontracting programs) that favor contractors who perform in labor surplus areas (Arnavas, 1995, Sec. 6-10). A "labor surplus area" (LSA) is defined in the FAR as a "geographical area identified by the Department of Labor in accordance with 20 CFR Part 654, Subpart A, as an area of concentrated unemployment or underemployment or an area of labor surplus." (FAR, 1996, Subpart 19.001)

Contractors qualify for LSA concern status if they and their first-tier subcontractors perform contract work substantially in a labor surplus area. A contractor has performed substantially in a labor surplus area if the manufacturing, production, or performance costs incurred under the contract in the labor surplus area exceed 50 percent of the contract price. A contractor need *not* be a small business to qualify for LSA concern preferences. (Arnavas, 1995, Sec. 6-10)

Contracts may be entirely set aside for LSA concerns when there is a reasonable expectation that offers will be obtained from a sufficient number of responsible LSA concerns to ensure reasonable prices. Whether the requisite conditions support a set-aside is within the discretion of the contracting officer, whose decision will not be overturned unless there is a clear showing of an abuse of discretion. (Arnavas, 1995, Sec 6-11)



### III. MAJOR SUPREME COURT DECISIONS

#### A. FULLILOVE V. KLUTZNICK (1980)

In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Supreme Court approved the provision of the Public Works Employment Act of 1977 requiring that ten percent of "Federal funds" awarded to state and local government entities, for local public works projects, must be used to purchase services or supplies from minority-owned businesses. The program was challenged by several contractor associations claiming that the provision violated the concept of "equal protection" inherent in the Due Process Clause of the Fifth Amendment. (Brody, 1996, p. 17)

In *Fullilove*, Chief Justice Burger reviewed the legislative history of the public Works Employment Act of 1977 and its documentation of the extensive history of discrimination against minorities in contracting, particularly in Federal procurement. The Chief Justice quoted from the 1977 Report of the House Committee on Small business, which explored discrimination in contracting in the construction industry, and found that the very basic problem disclosed by the testimony is that, over the years, a business system that has traditionally excluded quantifiable minority participation has developed. The report concluded that minorities, until recently, have not participated to any measurable extent in our total business system generally, and particularly in the construction industry. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access that

had their roots in racial discrimination. (Stephanopoulos, 1995, p. 56)

The Court asserted that the congressional objective was to ensure that those contractors receiving Federal funds would not use practices that would allow the effects of past discrimination in public contracting to continue. The Court held that Congress had the power to enact such legislation pursuant to the Commerce Clause, because the Act imposed economic regulations on private contractors receiving public funds. The Court further held that Congress could also impose such requirements on state governments pursuant to its enforcement powers contained in Section Five of the Fourteenth Amendment. (Brody, 1996, p. 17)

The Court explained that the ten-percent set-aside program by the Department of Transportation, a Federal agency, at issue in the case was “limited” and “properly tailored” to remedy the effects of prior discrimination, and was thus permissible even though some “innocent” parties may be burdened. The Court permitted this type of remedy because Congress has broad remedial powers to enforce equal protection guarantees. The Court explained that the provision could apply to specified minority groups only because it was not designed simply to benefit those groups, but to remedy the effects of prior discrimination by infusing some degree of equity into the contracting process. In other words, the legislation was meant to dismantle the ongoing network of discrimination. Indeed, the Court understood that Congress had authority to employ a racial criterion in order to accomplish “remedial objectives,” particularly where Federal funds are involved. Overall, in *Fullilove* case, the Supreme Court acknowledged congressional authority to

implement the legislative intent of the Fourteenth Amendment and other equal protection laws through the use of proactive programs. (Brody, 1996, p. 18)

In *Fullilove*, six Justices concurred in judgment, but no more than three agreed on a single rationale. Justice Marshall's concurrence found the correct level of scrutiny to be "intermediate." Relying on arguments that later became the basis for the holdings in *Croson* and *Adarand*, Justice Stewart's dissent asserted that "strict scrutiny" should apply to the challenged *Fullilove* program. (Gentile, 1995, p. 2)

While a true consensus regarding the correct standard of review remained unforged, *Fullilove* articulated at least some general principles. First, a majority of the Court agreed that it was permissible to require "innocent" non-minorities to share the burden of remedying past discrimination. Second, the Court appeared more willing to give deference to remedial actions fashioned at the Federal level. Finally, the Court found that specific findings of "past discrimination" need not precede the use of benign race classifications, at least not at the Federal level. (Gentile, 1995, p. 2)

#### **B. CITY OF RICHMOND V. J. A. CROSON & COMPANY (1989)**

In the *Croson* decision, 488 U.S. 469 (1989), the United States Supreme Court struck down as unconstitutional under the "equal protection" clause of the Fourteenth Amendment a city ordinance of Richmond, Virginia, that required 30 percent of each construction contract be awarded to minority business enterprise. The Court elected to use a "strict scrutiny" standard of review, thereby, placing the burden on the City of Richmond of establishing a "compelling governmental interest" and producing a response

that, basically, would only use race-conscious means if no other type of remedy was reasonably available. (Smith, 1993, p. 97)

Writing the majority opinion, Justice O'Connor elaborated on both elements of this constitutional "litmus test" applicable to state and local governments. In essence, a majority of the Court required that a *state* or *local* government must: (1) produce "specific evidence" of racial or ethnic discrimination against the group targeted for assistance, i.e., the evidentiary burden became greater and specific instances of overt discrimination was favored over general statistical analyses; and (2) select a remedy that is "narrowly tailored" to address the types of discrimination found to exist in the jurisdiction. (Smith, 1993, p. 97)

The Court decided that the Richmond ordinance failed both elements of this test. However, the court also took great measure to distinguish "federally enacted minority business programs." The majority opinion showed substantial deference to the "remedial powers of the Congress" when it exercised its authority under Section Five of the Fourteenth Amendment. The less exacting test of "reasonableness" applied to the Federal programs, as first announced in *Fullilove v. Klutznick*, remained undisturbed. (Smith, 1993, p. 97)

*Croson* presented the Supreme Court with essentially the same Federal statute it had previously upheld in *Fullilove*. Justice O'Connor applied the strict standard of review to the Richmond program, and found it to be in violation of the Equal Protection Clause of the Constitution. The Majority determined that Richmond neither demonstrated a



sufficiently “compelling interest” in the use of race-conscious remedies, nor “tailored the program narrowly” enough to “address a specifically identified past racial harm.”

However Justices Marshall, Brennan and Blackmun bitterly dissented, criticizing the majority insistence upon “strict scrutiny” as a nearsighted reading of the Fourteenth Amendment. Justice Marshall found that the Richmond plan was “sufficiently narrowly tailored” to fulfill the requirements of “intermediate scrutiny,” the standard he deemed applicable, and that even under “strict scrutiny” the program would survive. Under the more lenient “intermediate scrutiny,” the test implies whether a racial preference served an important governmental objective and is substantially related to the achievement of that objective. (Gentile, 1995, p. 3)

The *Croson* decision had a profound impact on state and local level. According to the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF), numerous states and political subdivisions had taken steps to dismantle their race and gender conscious Minority Business Enterprise programs as a result of *Croson* decision. Another result of *Croson* was that numerous jurisdictions conducted studies and held hearings to review and evaluate their programs in light of the Supreme Court’s decision. MBELDEF has also documented a small fraction of the destructive effect the *Croson* decision has had on minority-owned business in Richmond. For example, in Richmond during July 1987, when its program was first overturned by a lower court, minority business construction firms were participating in city construction at a rate of nearly 40 percent of the total dollars. Immediately, after the court’s decision, the minority business

share fell to 15 percent and was below three percent during the first six months of 1988. The United Commission on Minority Business Development submitted in its "final report" in 1993 that "even though the *Croson* decision was rendered in 1989, we have not been advised of any substantive effort in either the House of Representatives or the Senate to fashion a Federal solution." (Smith, 1993, pp. 98-99)

*Croson* has not resulted in the end of affirmative action at the state and local level. However, *Croson* has diminished the incidence of such programs, at least in contracting and procurement. Many governments reevaluated their MBE programs in light of *Croson*, and modified them to suit the applicable standards. Typically, the centerpiece of the Government's efforts has been a "disparity study," conducted by outside experts, to analyze patterns and practices in the local construction industry. The purpose of a "disparity study" was to determine whether there is evidence of discrimination against minorities in the local construction industry that would justify the use of remedial racial and ethnic classifications in contracting and procurement. Some studies also addressed the effectiveness of race-neutral alternatives. Post-*Croson* affirmative action programs in contracting and procurement tend to employ flexible numerical goals and/or bidding preferences in which race or ethnicity is a "plus" factor in the allocation decision, rather than a hard set-aside of the sort at issue in *Croson*. It appears that many of the post-*Croson* contracting and procurement programs that rest on "disparity studies" have not been challenged in court. (Dellinger, 1995, pp. 28-29)

The *Croson* decision evoked strong reaction. *Croson* was viewed by many

commentators as significantly hindering governmental efforts to achieve racial justice.

Doctrinally, *Croson* marked a turning point in that a majority of the Supreme Court agreed for the first time on the standard of review appropriate to remedial race-conscious programs, that of "strict scrutiny." (Gentile, 1995, p. 3)

### C. METRO BROADCASTING INC. V. FCC (1990)

On 27 June 1990, in *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), the Supreme Court upheld a Federal Communications Commission policy that gave preferences to certain minority and female applicants for broadcast station licenses. A five-to-four majority vote applied "intermediate scrutiny" to conclude that the two challenged programs, a minority preference in issuing licenses and the distress sale policy, were constitutional. Justice Brennan, writing for the Majority, found a non-remedial prospective goal, that of fostering broadcast diversity, to be of sufficiently important interest. Relying on *Fullilove*, the Court applied the "intermediate standard," and found that the FCC programs satisfied that test. In a strongly worded foreshadow of her *Adarand* decision, Justice O'Connor's dissent, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, advocated "strict scrutiny" of the minority programs, relying on reasoning similar to that of her majority opinion in *Croson*. (Gentile, 1995, p. 3)

The ruling was based upon three important judgments. First, the Court reiterated that Congress has greater authority to order preferences than private employers or other Government agencies (given its co-equal status with the other two branches of Government). Second, the Court applied a much more lenient standard of review for

race-conscious programs when such programs are enacted by Congress. It held that such programs are constitutional to the extent they “serve important Government objectives and are substantially related to the achievement of those objectives.” Third, the important Government interest endorsed by the Court was “broadcast diversity.” The Court reasoned that welfare of the public depends on “the widest possible dissemination of information from diverse and antagonistic sources.” (Taylor, 1991, p. 29) At least up to this point, the Federal Government’s prerogative to use racial preferences appears to have been vindicated in *Metro Broadcasting*. (Taylor, 1991, p. 32)

**D. ADARAND CONSTRUCTORS INC. V. PENA ( JUNE 1995)**

Until the recent *Adarand* decision, 115 S. Ct. at 2117 (1995), affirmative action programs initiated by the Federal Government were consistently analyzed under an “intermediate level of scrutiny.” These programs were afforded a more relaxed standard because of the Supreme Court’s deference to Congress. The Court seemed to be tacitly supporting Congress in continuing the process of realizing the overall goal of the Fourteenth Amendment and Title VII to eliminate the effect of discrimination in the work place. (Brody, 1996, p. 17)

The June 12, 1995 decision of the U.S. Supreme Court in *Adarand Constructors, Inc. v. Pena* would most likely continue to bring significant changes to the way the Federal Government allocates Federal contracts to minority-owned firms and the way those firms obtain business. The *Adarand* case is only the third time in the Supreme Court’s history that the Court has considered the constitutionality of a Federal affirmative action program,

and the decision is noteworthy for overturning the two precedents, *Fullilove* and *Metro Broadcasting*, set in Federal programs (Stephanopoulos, 1995, pp. 5-6).

# **1. Facts**

Adarand Constructors, Inc. is a Colorado highway guardrail subcontracting company owned and managed by a white male. Adarand brought suit to challenge the constitutionality of a Federal program (i.e., Department of Transportation program) designed to provide contract awards for disadvantaged business enterprises (DBEs). (Gentile, 1995, p. 4)

A subcontracting compensation clause (SCC) program of the challenged Federal program, implemented in Colorado through the Central Federal Lands Highway Division, awards incentive payments to prime contractors who subcontract with DBEs. No rigid quotas are involved in the program. A prime contractor is not required to hire DBEs as a condition of eligibility for award of the prime contract, and can choose to exercise the incentive option or ignore it completely. (Gentile, 1995, p. 4)

In 1989, a prime highway contract was awarded to Mountain Gravel & Construction Company, who then solicited bids for the guardrail portion of the highway project. Under the subcontracting compensation clause, the prime contractor receives additional compensation of ten percent of the contract's value if it subcontracts to DBEs. Adarand Constructors, Inc., submitted the lowest bid for the guardrail subcontract advertised by Mountain Gravel. However, in order to collect a \$10,000 bonus offered by the Department of Transportation for awarding subcontracts to DBEs, Mountain Gravel

awarded the guardrail subcontract to the second-lowest bidder, Gonzales Construction Company, a certified DBE, despite the fact that Adarand's bid was \$1,700 lower. (Gentile, 1995, p. 4)

## **2. Procedural History**

In 1992, Adarand brought suit in the District Court of Colorado, alleging violations of the equal protection guarantees of the Fifth and Fourteenth Amendments, specifically arguing that section 502 of the Small Business Act was unconstitutional as applied and violated the Fifth Amendment to the U.S. Constitution, which has been interpreted to guarantee each and every citizen the "equal protection of the law" under the Due Process Clause. In essence, Adarand claimed that because the subcontract was awarded on class-based, noncompetitive grounds, Adarand did not receive equal treatment under the law. (Wekstein, 1995, p. 19) The District Court held that the Federal program at issue required analysis pursuant to the "intermediate standard" of *Fullilove* and *Metro Broadcasting*, and not, as Adarand sought, the "strict scrutiny" analysis given the state program in *Croson*. The District Court granted summary judgment in favor of the Government (Gentile, 1995, p. 4).

On appeal, the Tenth Circuit affirmed on grounds different from those relied upon by the District Court. Adarand petitioned the Supreme Court for a *writ of certiorari*, which was granted. By a five-to-four vote, the Supreme Court ruled in Adarand's favor. The Court vacated the Tenth Circuit's decision and remanded the case for reconsideration, recognizing that its decision would alter the playing field in some important respects.

(Gentile, 1995, p. 4) In the process, the Court largely overruled two precedents that had governed preferences in Federal Government contracting, *Fullilove v. Klutznick* and *Metro Broadcasting, Inc. v. FCC*. (Wekstein, 1995, p.21)

### **3. Supreme Court Opinion**

The Supreme Court began with a historical overview of the Fifth Amendment Due Process Clause and its relation to "equal protection." It recounted the Japanese curfew internment cases, which granted almost unlimited deference to Federal regulations by separating the obligations of equal protection as between the states and Federal Government. But, as time went by, the Court began to recognize that the Due Process Clause in the Fifth Amendment incorporated the idea of "equal protection." The Court eventually stated that the equal protection provisions in the Fifth and Fourteenth Amendments were equivalent. Therefore, the Court agreed with *Adarand* that its claim pursuant to the Fifth Amendment provided sufficient grounds upon which to base an equal protection violation. This decision allowed the Court to apply the Fourteenth Amendment "equal protection" analysis to the regulation at issue. (Brody, 1995, p. 19)

The conservative Justices supported the application of "strict scrutiny." Under this analysis, any racial classification would be a "suspect classification" and, therefore, receive the most involved examination of the need for the program and the extent to which the program achieved that need without exceeding its limits. The liberal Justices, on the other hand, considered such programs to be benign in nature, as the intent of the programs was to remedy past discrimination and its lingering effects. These justices supported an

“intermediate level” of scrutiny. Under this approach remedial programs initiated to combat past and present racial discrimination would receive a less strenuous level of review and have a better opportunity to survive a constitutional inquisition. Justice O’Connor determined that there was no prior consensus on the proper standard to be applied concerning race-conscious classifications under equal protection analysis. (Brody, 1995, p. 19)

The Court next discussed the “strict scrutiny” analysis applied in *Richmond v. Croson*, citing it as the controlling precedent on the issue. The Court extended *Croson* to make strict scrutiny applicable to all Government programs that involve race. In the process, the Court overruled its prior decision in *Metro Broadcasting, Inc. v. FCC*, which determined that race-conscious Federal programs intended to benefit minorities constituted benign discrimination and, therefore, were subject to an “intermediate level of scrutiny.”

In her majority opinion, Justice O’Connor determined that “strict scrutiny” is the single standard of review to be applied to all race-conscious actions, whether benign or invidious, state or federally mandated. *Metro Broadcasting* was overruled insofar as it is inconsistent with that holding. (Gentile, 1995, p. 4)

While acknowledging the uncertain legacy of prior affirmative action holdings, the Court announced that three general propositions had been established with respect to analysis of governmental racial classifications. The Court examined its approach to this analysis as incorporating skepticism, consistency and congruence. “Skepticism” requires



that any preference based on racial or ethnic criteria must necessarily receive a most searching examination. "Consistency" requires that the standard of review is independent of the race of those burdened or benefitted by a racial classification (i.e., all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized). Finally, "congruence" requires that equal protection analysis under the Fifth (Federal actions) and Fourteenth Amendments (state and local actions) be the same. (Gentile, 1995, p. 4)

The Court determined that the *Metro Broadcasting* decision threatened the effectiveness of these three basic principles by incorrectly interpreting the Fourteenth and Fifth Amendments to protect "groups" rather than "persons." Adhering to these three propositions, the Court held that any governmental classification based on race must be subject to "strict scrutiny." (Brody, 1995, p. 20)

The Court also argued that the use of a standard less than strict scrutiny effectively rejected the newly identified proposition of congruence between level of Judicial review applicable to both Federal and state affirmative action programs. Thus, by refusing to follow the standard required by *Metro Broadcasting*, and looking instead to the teachings of *Croson*, the Supreme Court concluded that it did not depart from the fabric of law; rather, it restored it. (Gentile, 1995, p. 5)

In *Fullilove*, the Court had upheld Congress' inclusion of a ten-percent set-aside for minority-owned businesses in the Public Works Employment Act of 1977. The Court explained that "the limited use of racial and ethnic criteria in the context presented is a

constitutionally permissible means for achieving the congressional objectives.” (Report to the President, 1995, p. 56) In *Metro Broadcasting*, the Court affirmed Congress’ right to require that a certain number or percentage of broadcasting licenses be set aside for auction to minorities, stating that the requirement served the “important governmental objective” of “enhancing broadcast diversity.” (Wekstein, 1995, p. 21)

In *Adarand*, however, the Court reversed the viewpoint, holding that all racial classifications are constitutional only if they are “narrowly tailored” to address identifiable “past discriminations” that further “compelling governmental interests.” Justice Scalia went even further stating that Government can never have a “compelling interest” in discriminating on the basis of race in order to “make up” for past racial discrimination in the opposite direction. (Wekstein, 1995, pp. 21-22)

#### **IV. POST-ADARAND CHALLENGES AND COURTS CASES**

##### **A. SUMMARY OF POST-ADARAND CHALLENGES**

Since the *Adarand* decision, eight challenges to the constitutionality of set-aside programs have been filed: four challenging the SBA's 8(a) Program, one challenging the DoD's SDB Set-aside Program ("rule of two") and three challenging the DoD's SDB "price evaluation preference" program. The first 8(a) challenge was filed by C. S. McCrossan on November 13, 1995, in the U.S. District Court for the District of New Mexico (CIV-95-1345) on the basis that the program violates its right to equal protection under the Fifth Amendment to the Constitution and its right to enter into contracts free of discrimination under the Civil Rights Act of 1866 (Ireton, Feb. 1996, p.41). The second 8(a) challenge was filed by Science Applications International Corp. on November 17, 1995, in the U.S. District Court for the District of Columbia (1:95CV02140) after a requirement it had performed for 19 years was set aside for procurement from an 8(a) firm. The third 8(a) challenge was filed by Dyna Lantic Corp. in the U.S. District Court for the District of Colombia (1:95CV02301) alleging that the Navy's decision to set aside a procurement for an 8(a) firm is based on a racial preference program that is unconstitutional in light of the *Adarand* decision (FCR, 19 Jan 1996, pp. 14-15). The fourth and the latest challenge to the 8(a) Program was filed by Ellsworth Associates Inc., who was the incumbent contractor and a former 8(a) firm whose program eligibility had expired, in May 1996 in the U.S. District Court for the District of Colombia (96-74).

In August 1995, Elrich Contracting Inc. and The George Byron Co. each filed a protest with the General Accounting Office challenging the constitutionality of DoD's SDB Set-aside Program. In December 1995, G. H. Harlow Corporation requested that the General Accounting Office reconsider previously dismissed protests challenging the constitutionality of DoD's "rule of two" program. Also, in December 1995, Kay and Associates Inc. challenged the DoD's policy for giving ten-percent price evaluation preference to SDBs.

**B. KAY AND ASSOCIATES INC. V. U.S.**

In December 1995, Kay and Associates Inc. (KAI) filed the first post-*Adarand* challenge to the constitutionality of the DoD's policy of giving a ten-percent price preference (i.e., SDB "price evaluation preference" program) to small disadvantaged businesses competing for DoD contracts (*Kay and Associates Inc. v. U.S.*, DC Nill, No. 95-6243). However, the Navy's cancellation of the award to Jesus Is Lord (JIL) Information Systems of the \$39.1 million contract for aircraft maintenance services at the Naval Air War Center, China Lake, California, has mooted the challenge by KAI. The contract modification stated that "because of an incorrect certification as to small disadvantaged business status, the ten-percent preference should not have been applied. Consequently, the award is void." JIL has withdrawn its proposal, and the award was canceled. (FCR, Dec. 1995, p. 540)

Incumbent contractor KAI had sought a judgment claiming that the Navy impermissibly discriminated against it by applying DoD's ten-percent SDB price

evaluation preference in awarding the contract to JIL. KAI argued that the policy and the underlying statute and regulations could not survive the "strict scrutiny" to be applied to Federal race-based preference programs in light of the *Adarand* decision. KAI spokesperson stated that KAI should have been awarded the contract since it offered the lowest price before application of the ten-percent evaluation factor. (FCR, Dec. 95, p.540)

### C. SCIENCE APPLICATIONS INTERNATIONAL CORP. V. U.S.

Science Applications International Corp. (SAIC) has filed suit in the U.S. District Court for the District of Columbia alleging that a Defense Department decision to set aside a procurement for an 8(a) firm is based on a racial preference program that is unconstitutional in light of the Supreme Court's *Adarand* Decision (*Science Applications International Corp. v. U.S.*, DC DC, No. 1:95CV02140, complaint filed November 17, 1995). (FCR, Dec. 1995, p. 491)

SAIC sought to enjoin DoD from awarding to Corea Enterprises Inc. a non-competitive 8(a) subcontract to provide specialized conference planning services for the Defense Science Board's annual summer study program (SSP). SAIC, which has held the contract for the past 19 years, also sought a declaration that the set-asides and goals contained in 10 USC 2323(a), which established a five-percent goal for DoD, and section 8(a) of the Small Business Act are unconstitutional. (FCR, Dec. 1995, p. 491)

SAIC stated that "under *Adarand*, the use of racial preferences to award government contracts is prohibited unless there is a *compelling Government interest* and the measures are *narrowly tailored* to meet specific *remedial goals*." SAIC argued that in

this case the Government cannot show that there is past discrimination in the specialized conference planning industry that would justify a racial preference, nor that use of a racial preference for the SSP procurement is “narrowly tailored” to “remedy any past discrimination.” (FCR, Dec. 1995, p. 491)

SAIC pointed out that in October 1995 DoD suspended the “rule of two” in light of *Adarand* decision. SAIC stated that the 8(a) set-aside scheme is “far worse than the unconstitutional ‘rule of two’ because it imposes a *de facto* ‘rule of one.’” SAIC asserted that under the 8(a) Program, a procurement is reserved for exclusive 8(a) participation if only one qualified minority contractor exists, without any regard to the existence, amount or nature of past discrimination that the individual contractor has suffered or any remedy the award might generate. (FCR, Dec. 1995, p. 491)

In arguing for injunctive relief, SAIC observed that the U.S. Court of Appeals for the District of Columbia Circuit has recognized that improper denial of the right to compete for a Government contract constitutes irreparable harm. Further, if there is no injunction, SAIC will be forced to terminate some of its workforce, a majority of whom are women and minorities, causing further irreparable harms. Ironically, SAIC happened to be a strong advocate of the Government’s goal to increase contracting opportunities for SDBs. For the past two years SAIC has been honored by DoD for awarding 51 percent of its defense subcontracts to small businesses. It also awarded more than eight percent of all its defense-related subcontracts to SDBs. (FCR, Dec. 1995, p. 491)

**D. C. S. MC CROSSAN CONSTRUCTION CO. V. COOK**

C. S. McCrossan Construction Co., a white-owned, Minneapolis-based construction company, filed suit in November 1995 in the U.S. District Court for the District of New Mexico challenging the constitutionality of the SBA's 8(a) set-aside program for SDBs as applied by the DoD at the White Sands Missile Range (*C.S. McCrossan Construction Co. v. Cook*, DC NM, No. CIV-95-1345, complaint filed November 13, 1995). McCrossan claimed that the 8(a) Program as applied by the Army Corps of Engineers at the White Sands Missile Range in New Mexico, violated its right to "equal protection" under the Fifth Amendment and its right to make contracts free from discrimination based on race or ethnicity under 42 USC 1981, the Civil Rights Act of 1866. (FCR, Dec. 1995, p. 493)

McCrossan was prevented from bidding on a contract worth about \$15 million for general heavy construction at White Sands because the Corps restricted its solicitation to small businesses that have been certified by the SBA as owned by *socially and economically disadvantaged* individuals. Similar to the SAIC challenge, McCrossan is suing the SBA, the Corps, the Army and DoD, claiming that they "lack the required legal and factual support to justify their race-based program" in light of the *Adarand* decision. The company claimed that it was unlawfully excluded from submitting a bid on the basis of race. McCrossan also charged that the 8(a) Program "as applied at White Sands is not narrowly tailored to remedy the effects of past discrimination against participants in White Sands construction projects" and therefore violates the company's rights under the Fifth

Amendment and Section 1981. (FCR, Dec. 1995, p. 493)

McCrossan's request for a preliminary injunction was denied by a Federal judge in New Mexico on April 2, 1996, and in doing so the court refused to block the Federal Government's biggest contracting set-aside program. U.S. District Judge Howard C. Bratton, who had been appointed by President Lyndon B. Johnson, found that McCrossan had standing to sue, but denied the request for a preliminary injunction because the company failed to show it would suffer irreparable injury if a preliminary injunction were not granted. The court also found that the balance of hardships weighs in favor of the Federal Government, and issuance of the injunction would be adverse to the public interest. Judge Bratton's nine-page ruling did not explain his reasoning in detail, but he said that McCrossan had not demonstrated a substantial likelihood of prevailing on the merits at a full trial. That is, defendants have submitted significant evidence that the 8(a) program may survive "strict scrutiny." (FCR, Apr. 95, p. 374)

The Federal Government argued that McCrossan lacked standing to sue because as neither a small business nor one owned by socially or economically disadvantaged individuals, it fails to qualify for the 8(a) Program for reasons having nothing to do with race. The Government also argued that even if the court were to strike down the *socially disadvantaged* component of the 8(a) Program as unconstitutional, McCrossan still would not qualify because of its economic status. That is, in order to qualify as small business under 8(a) Program, a construction firm's annual receipts cannot exceed \$17 million; McCrossan's annual receipts for fiscal 1995 were between \$50 million and \$75 million.



However, the court pointed out that rather than seeking entrance to the 8(a) Program, McCrossan "is challenging the Government's preferential treatment toward 8(a) Program participants" in accepting bids for the contract. Bratton says the required showing of *economic disadvantage* in turn requires a showing of *social disadvantage*, "which then implicates the race-based challenge." The court found that McCrossan's claim, that it is willing and able to bid on the contract and that preventing it from competing on an equal basis violates its constitutional rights, is sufficient to establish standing (FCR, Apr. 1996, pp. 374-375). Judge Bratton noted in his opinion that "the 8(a) Program is an important Federal remedial contracting measure . . . Many small disadvantaged contractors within the program undoubtedly will be economically damaged if the 8(a) Program is jeopardized." On April 4, 1996, McCrossan filed an appeal, against Judge Bratton's preliminary ruling, with the U.S. Court of Appeals for the Tenth Circuit in an effort to freeze the bidding on the contested contract. McCrossan's lawyer stated that even if it loses the appeal and the contract is let, McCrossan would likely proceed to a trial (Barrett, 1996, p. 46).

A Justice Department spokesman stated that the judge's pronouncement was a victory for the Clinton administration. The Clinton administration is attempting a delicate balance of defending existing affirmative-action programs in court while preparing to restrict some of the same programs through regulatory and policy changes. The White House already suspended DoD's "rule of two" program indefinitely in October 1995 in the wake of *Adarand* decision. (Barrett, 1996, pp. 46-47)

**E. DYNA LANTIC CORP. V. U.S. DEPARTMENT OF DEFENSE**

Dyna Lantic Corp., a non-minority owned small business based in Deer Park, New York, has filed suit in the U.S. District Court for the District of Columbia alleging that the Navy's decision to set-aside a procurement for an 8(a) firm is based on a racial preference program that is unconstitutional in light of the *Adarand* decision (*Dyna Lantic Corp. v. U.S. Department of Defense*, DC DC, No. 1:95CV02301, complaint filed December 15, 1995). Dyna Lantic sought to enjoin the Navy from awarding a contract for the development of the UH-1N Helicopter Aircrew Procedures Trainer (APT) for the Naval Air Warfare Center based on the race of the contractor. Dyna Lantic, which is the contractor for the upgrade of the Army's UH-1H Instrument Flight Trainers, was precluded from competing for the APT contract because of the Navy's decision to set aside the contract for 8(a) firms. Dyna Lantic's challenge to the constitutionality of the 8(a) program is very similar to allegations by *McCrossan* and *Science Applications International Corp.* (FCR, Jan 1996, p. 14). According to Washington Technology, on April 18, 1996, Dyna Lantic asked a Washington judge to halt the 8(a) contract for development of the UH-1N Helicopter APT (Washington, 1996, p. 1).

Dyna Lantic is a small business engaged in the design and manufacture of military equipment simulators and related training equipment. It receives over 90 percent of its total revenues from prime contracts with the Government. The company claims that over the last five years the firm has found "fewer and fewer opportunities" to compete for Government programs due to "an ever-increasing amount" of awards being reserved for

8(a) and SDB companies. Naval Air Warfare Center Training Systems Division (NAWCTSD) stated that in the past two years, the number of qualified 8(a) companies registered at NAWCTSD went from 51 to over 120. Dyna Lantic's concern is that with over 120 qualified 8(a) firms, there is "little or no opportunity" for non-8(a) small businesses to compete. Dyna Lantic stated that "we are unable, by reason of our small size, to compete for large value programs. We are unable, by reason of the racial status of our ownership, to compete for most of the small value programs." (FCR, Jan. 1996, p. 15)

Dyna Lantic claims that to demonstrate a "compelling Government interest" for the scheme or the set-aside, the Government must show significant statistical disparities between the level of minority participation in the particular industry and the percentage of qualified minorities in the applicable pool, and must show a relationship between any statistical disparities to actual racial discrimination in the relevant industry. In addition, Dyna Lantic asserted that "there is no strong basis in evidence here for the conclusion that race-based classifications are necessary to remedy past discrimination by the Navy in the military simulator manufacturing industry." (FCR, Jan. 1996, p. 15)

**F. ELLISWORTH ASSOCIATES INC. V. U.S.**

On May 28, 1996, Ellsworth Associates Inc., a graduate of the Small Business Administration's 8(a) business development program, challenged the constitutionality of the 8(a) Program on the same ground as the three previously discussed 8(a) challenges (*Ellsworth Associates Inc. v. U.S.*, DC DC, No. 96-74). Ellsworth sued the Government, alleging that they were denied an opportunity to compete for a Commerce

Department follow-on contract for computer support services. Commerce reserved the contract for the 8(a) Program. Ellsworth was the incumbent contractor and a former 8(a) firm whose program eligibility had expired. (FCR, July 1996, p. 17)

However, the U.S. District Court for the District of Columbia decided that Ellsworth lacked standing to challenge the 8(a) Program. Judge Charles R. Richey stated that "because Ellsworth was ineligible to participate in the Program by virtue of the expiration of its eligibility rather than because of the alleged unconstitutionality of the regulation, the plaintiff lacks standing to challenge the Program." He further stated that "since the plaintiff is ineligible for 8(a), its injury is traceable solely to the statutory nine-year limit on 8(a) participation--and not to the defendants' actions with respect to the follow-on contract. Stated another way, the plaintiff's inability to bid on the follow-on contract rests on a racially neutral and constitutionally unassailable ground. Moreover, even if the presumption of social disadvantage accorded to minority groups were found to be unconstitutional, other parts of the 8(a) Program--including the race-neutral provision limiting participation to nine years--would remain intact." (FCR, July 1996, pp. 17-18)

**G. ELRICH CONTRACTING INC. & THE GEORGE BYRON CO.**

In August 1995, Elrich Contracting Inc. and The George Byron Co. each filed protest with the General Accounting Office challenging the constitutionality of DoD's "rule of two" procurement, contending that the set-aside is inconsistent with the Supreme Court's ruling in *Adarand* decision. GAO says that *Adarand* did not determine the constitutionality of the DOT program or any other racially-based program. GAO claims

that the Court in *Adarand* simply announced the standard that is to be applied in determining the constitutionality of such programs and remanded the case to the lower courts for further consideration in light of that standard. Thus, GAO says, whether any particular program is unconstitutional was left to the lower Federal courts to determine. GAO stated that "there must be clear judicial precedent before we will consider a protest based on the asserted unconstitutionality of the procuring agency's actions, and *Adarand* did not provide that precedent." GAO therefore dismissed the protests. (FCR, Sep 1995, p. 219)

#### **H. G. H. HARLOW CORPORATION**

In December 1995, the General Accounting Office (GAO) denied a request to reconsider its dismissal of a protest challenging the constitutionality of the DoD's SDB Set-aside Program because there is "no clear judicial precedent." It rejected the protester's contentions that precedent developed based on the *Croson* decision is applicable here, and that the suspension of DoD's SDB Set-aside Program indicates DoD's view that *Adarand* constitutes such precedent. Protester G. H. Harlow Co. challenged the issuance of a DoD invitation for bids as a total SDB set-aside, arguing that the set-aside was inconsistent with the Supreme Court's *Adarand* decision (G. H. Harlow Co. Inc., Reconsideration, GAO, B-266144.3, 28 February 1996). (FCR, March 1996, p. 281)

GAO dismissed Harlow's protest because it did not view *Adarand* as providing clear judicial precedent on the constitutionality of set-aside programs, i.e., the Supreme

Court did not determine the constitutionality of any particular racially-based program. However, in requesting reconsideration, Harlow maintained that “clear judicial precedent” exists in this area and argued that since the *Adarand* decision, racially based set-aside programs imposed by the Federal Government are subject to the same “strict scrutiny” standard that applied to state or local programs under the Court’s 1989 decision in *Croson*. GAO disagreed stating that “our position is that there must be clear judicial precedent on the precise issue presented to us before we will consider a protest based on the asserted unconstitutionality of a procuring agency’s action.” GAO further stated that neither the *Adarand* nor the *Croson* decision constitutes clear judicial precedent on the constitutionality of this SDB set-aside program. (FCR, March 1996, p. 281)

Harlow, submitting a copy of the October 23, 1995, DoD memorandum suspending various DFARS provisions applicable to set-aside and directing contracting officers not to set aside acquisitions for SDBs until further notice, argued that the “obvious thrust” of that memorandum is that DoD considers *Adarand* to be clear judicial precedent invalidating its SDB set-aside program. GAO disagreed by stating that the memorandum does not reflect DoD’s final position on the impact of *Adarand* on its SDB set-aside program but merely suspends the applicable DFARS provisions while DoD reviews the program. GAO further stated that the memorandum specifically permits acquisitions being conducted as SDB set-asides to proceed undisturbed when withdrawing the set-aside would unduly delay the procurement. (FCR, March 1996, pp. 281-282)

## V. POST-ADARAND ATTEMPTS TO AMEND/ABOLISH SET-ASIDE

### A. PRESIDENT CLINTON'S DIRECTIVE

On July 19, 1995, reaffirming his support for affirmative action, President Clinton announced the results of a five-month White House study of Federal affirmative action programs, which he ordered in February 1995, and vowed to continue supporting those efforts within his administration. In a speech at the National Archives, before a gathering of civil rights activists, administration officials and others, he made the following key remarks:

"We must, and we will, comply with the Supreme Court's *Adarand* decision . . . in particular, that means focusing set-aside programs on particular regions and business sectors where the problems of discrimination or exclusion are provable and are clearly requiring affirmative action. I have directed the Attorney General and the agencies to move forward with compliance with *Adarand* expeditiously. . . . Affirmative action has not always been perfect, and affirmative action should not go on forever. It should be changed now to take care of those things that are wrong, and it should be retired when its job is done. I am resolved that that day will come. But the evidence suggests, indeed, screams that that day has not come. . . . Based on the evidence, the job is not done. . . . We should reaffirm the principle of affirmative action and fix the practices. We should have a simple slogan: mend it, but don't end it." (Clinton, 1995, pp. 9-11)

To comply with Supreme Court's *Adarand* decision, President Clinton issued a directive on July 19, 1995, instructing Federal agencies to review their affirmative action programs and to eliminate or reform any program that: (1) creates a quota; (2) creates preferences for unqualified individuals; (3) creates reverse discrimination; or (4) continues even after its equal opportunity purposes have been achieved. (White, 1995, pp. 1-2)

## **B. GRAMM OR MURRAY AMENDMENT**

On July 20, 1995, Senator Phil Gramm (Republican-Texas), former Republican candidate for Presidential nomination, offered an amendment to the legislative branch appropriations bill to prohibit agencies funded by the bill from awarding Federal contracts on the basis of race, color national origin or gender. The amendment was rejected by a vote of 36 to 61. However, following the defeat of the Gramm amendment, the Senate approved by a vote of 84-13, a somewhat similar substitute amendment introduced by Senator Patty Murray (Democrat, Washington), which incorporates standards for Federal affirmative action programs set forth by President Clinton. The Murray amendment bars the use of funds made available by the appropriations act for programs that result in the awarding of Federal contracts to unqualified persons, programs that create reverse discrimination or quotas or for programs inconsistent with the Supreme Court's *Adarand* decision. (Bruno, 1995, p.3)

## **C. FRANKS AMENDMENT**

In the House, Black Congressman Gary Franks (Republican-Connecticut) had planned to introduce a similar amendment to the defense appropriations bill to: (1) end groups preferences for Government contracts, specifically it prohibits the use of Federal funds to implement programs or policies which require or encourage the awarding of Federal contracts or subcontracts on the basis of race, national origin or gender; (2) limit remedies to situations of proven discrimination, i.e., maintain the availability of race and gender conscious judicial remedies and consent decrees in the cases of proven past



discrimination; (3) promote affirmative outreach and recruitment to expand the number of minority and women-owned firms submitting bids on Federal contracts; and (4) protects historically Black colleges. The Franks Amendment does not address the issue of the Federal Government requiring Federal contractors to establish racial or gender preferences within their own workplaces and with their suppliers and subcontractors. The House Rules Committee, however, did not allow him to offer that amendment. (Bruno, 1995, p. 3)

#### **D. EQUAL OPPORTUNITY ACT OF 1996**

On July 27, 1995, Senator Robert Dole (Republican-Kansas) and Congressman Charles Canady (Republican-Florida) introduced the "Equal Opportunity Act of 1995" (now called "Equal Opportunity Act of 1996"). This legislation, which follows and resembles the earlier legislative initiatives by Senator Gramm and Representative Franks, would forbid the Federal Government from granting any preference on the basis of race, color, national origin or gender "in connection with a Federal contract or subcontract." In addition, the bills prohibit the Government from requiring or encouraging contractors to grant any such preference. The bills would also relieve contractors of having to maintain affirmative action plans with goals and timetables. The bills define the term "grant a preference" to include "any use of a quota, set-aside, numerical goal, timetable or other numerical objective." However, the bill does permit affirmative recruiting, outreach and marketing efforts targeted at minorities and women, as long as racial or gender preferences are not used to determine outcomes. The bill also permits programs to

benefit historically Black colleges and universities, Indian tribes and classifications based on gender due to bona fide occupational qualifications, privacy and national security concerns. (Dees, September 1995, p. 31)

The proposed bill, would also nullify Executive Order 11246, a 30-year old edict, which established the Labor Department's Office of Federal Contract Compliance Programs (OFCCP). OFCCP is responsible for enforcing Executive Order 11246, which requires companies that are awarded Federal contracts of \$50,000 or more to develop and maintain written affirmative action plans. About 22 percent of the labor force employed by Federal contractors or subcontractors is subject to OFCCP regulations. The measure would repeal race and gender preferences in some 160 Federal programs identified by the Congressional Research Service (FCR, June 1995, p. 697). This Dole-Canady legislation would end Federal programs that give preferences to minorities and women; however, it would not forbid state and local governments or the private entities, including Federal contractors or recipients of Federal financial assistance, from voluntarily engaging in racial, ethnic or gender preferences that are otherwise permitted by law. The bill also does nothing to change enforcement of anti-discrimination laws, i.e., the courts are maintained as open avenues for prosecuting discrimination and providing full remedies (damages and injunctive relief) to victims of racial or gender discrimination. (Bruno, 1995, p. 3)

In an eight-to-five party-line vote, the House Judiciary Subcommittee approved the proposed legislation in March 1996; however, the Clinton administration continues to oppose the bill (Farrell, 1996, p.1). The bill's sponsor, Republican Congressman Canady,

stated that the current affirmative action programs are "based on the belief that in order to overcome discrimination, we must practice discrimination. That perverse logic has created a system that undermines the fundamental values it was intended to protect." But, Attorney General Janet Reno stated on March 7, 1996, that the Clinton administration "feels very strongly that there is still a need for addressing the vestiges of racial discrimination." (USA, 1996, pp. 31-32)

#### **E. SUSPENSION OF DOD'S "RULE OF TWO"**

Effective October 23, 1995, the Under Secretary of Defense for Acquisition and Technology (USD A&T) issued a directive suspending the Section 1207 DoD SDB set-aside program, and subsequently the DoD suspended DFARS sections 219.501 (S-70); 219.502-2-70; 219.502-4; 219.504(b)(I); 219.506; 219.508(e); 219.508-70 and contract clause 252.219-7002 in compliance with the U.S. Supreme Court's decision in *Adarand*. This action resulted in a suspension of DoD's "rule of two" under which prime contracts are set aside for competition among SDBs if two or more SDBs are available and qualified to bid on the requirement. However, the suspension does not affect the SDB "price evaluation preference" program. Under this price evaluation preference, an SDB may be awarded a contract for which its price is up to ten percent higher than a non-SDB competitor. (Ireton, Jan 1996, p. 28)

The "rule of two" program was suspended pending a Government-wide review of all Federal affirmative action programs in the wake of the Supreme Court's *Adarand* decision. The directive provided that, effective immediately and until further notice,

contracting officers should not set aside acquisitions for SDBs. The suspension is expected to have a major impact on SDBs in construction and information technology industries, as well as SDB subcontracts under prime contracts. (Ireton, Jan 1996, p. 28) The rule has been a significant tool used by DoD since 1987 to help meet its five-percent statutory goal for awarding prime contracts and subcontracts to SDBs, historically Black colleges and universities, and minority institutions. The Act left to DoD's discretion the promulgation of regulations and procedures necessary to achieve the statutory objectives of awarding five percent of the dollar value of DoD's contracts to SDB concerns. (FCR, Oct 95, p. 368)

Although not affected by the decision, many of the 8(a) Program regulations contain language identical to DoD's Section 1207 coverage on the "rule of two" set-aside program. Following the suspension, the president of the Associated General Contractors of America, an industry group, wrote and thanked President Clinton for adhering to the Supreme Court decision in the *Adarand* case. He further urged the president to complete the process by removing the "price evaluation preference" program from the Section 1207 and by suspending the 8(a) Program. (FCR, 1995, p. 369)

On October 23, 1995, Deputy Secretary of Defense John White stated that the suspension of the program does not change the DoD's commitment to support and bring SDBs into the defense industrial base. He further instructed the Service secretaries and defense agency directors to "redouble" their efforts to achieve that objective (FCR, 1995, p. 369). Similarly, Under Secretary of Defense for Acquisition and Technology Paul G.

Kaminski emphasized, in his memoranda dated November 3, 1995 and March 4, 1996, the maximum use of media's ability (particularly minority media) to disseminate information concerning proposed acquisitions to SDBs, increased use of the 8(a) Program to make up for the shortfall particularly in those industries where SDB participation and 8(a) awards are low and extraordinary effort and creativity on behalf of agencies to maintain and expand the participation of SDBs in DoD's acquisition programs. (Kaminski, 1995 & 1996)

#### **F. PROPOSAL TO ABOLISH 8(A) PROGRAM**

House Small Business Committee Chair Jan Meyers (Republican-Kansas), is presently planning to introduce legislation to abolish the 8(a) Program. Meyers is debating whether to include the legislation as part of a Small Business Act Reauthorization bill or as a freestanding measure. The Small Business Act currently is authorized through Fiscal Year 1997. The frustration and failure after many attempts to fix problems and abuses in the Small Business Administration's 8(a) Program have prompted Representative Meyers to end the 8(a) Program. (Armes, 1996, p. 431)

During the hearing before the House of Representatives Small Business Committee on December 13, 1995, Meyer cited abuses in 8(a) Program eligibility, claiming that millionaires have been able to qualify for the program, which is intended to facilitate business development for small firms owned by socially and economically disadvantaged individuals, and only a small percentage of all program participants actually receive any contracts. Meyer has also criticized the program for awarding the overwhelming majority

of contracts on a sole source basis (the program uses a combination of set-asides and price preferences) and for awarding 60 percent of 8(a) contracts to firms in the Washington, D.C., area, when the original intent was to support small business development nationwide. On December 14, 1995, she had called on the Small Business Administration to impose a moratorium on sole source 8(a) contracting. (Armes, 1996, p. 431)

A report by the General Accounting Office and the SBA Inspector General have also substantiated congressional concerns that the program in the past failed: (1) to adhere to program eligibility requirements; and (2) to graduate firms after they have reached a point where they could have been able to compete on their own. The report also stated that there is a strong evidence that a significant number of graduated 8(a) firms failed after leaving the program, i.e., they failed to develop non-8(a) businesses that would sustain them when they are no longer qualified to receive 8(a) contracts (England, 1995, p. 2). In addition, GAO reported that contracting officers have sometimes underestimated the true value of contracts so as to avoid the requirement for competition. SBA regulations require contracting officers to offer 8(a) contracts for competition amongst 8(a) firms whenever the Government estimate of the total value of the contracts exceeds the applicable "competitive threshold" of \$5 million for manufacturing contracts and \$3 million for all others. (Armes, 1995, p. 431)

In March and April 1995, GAO testified that the program has continued to experience problems in achieving its objectives. As the value and number of 8(a) contracts continue to grow, the distribution of those contracts remains concentrated among a very

small percentage of participating 8(a) firms, while a large percentage get no awards at all (Wheeler, 1994, p. 1). For example, in Fiscal Year 1990, 50 firms representing fewer than two percent of all program participants obtained about 40 percent, or \$1.5 billion, of the total \$4 billion awarded. Greater concern is that of the approximately 8,300 8(a) contracts awarded in Fiscal Years 1990 and 1991, only 67 contracts were awarded competitively. In Fiscal Year 1994, the top 50 firms represented one percent of the program participants and obtained 25 percent, or \$1.1 billion, of the \$4.37 billion awarded, while 56 percent of the firms got no awards. In Fiscal Year 1994, \$383 million in contracts were awarded competitively. (GAO, 1995, pp. 3-4)

Other conference reports also indicated abuse in the 8(a) Program: In 1994, 50 firms -- about one percent of the 5,000 plus 8(a) participants -- received about 25 percent of the set-aside contracts and subcontracts worth in excess of \$1 billion. Last year SBA auditors investigated 50 separate 8(a) companies and found that 35 owners were worth more than \$1 million, and some were worth as much as \$9 million. Of nearly 6,000 new contracts awarded under the 8(a) Program, only 174 -- or about two percent -- were awarded competitively. GAO has also documented numerous occasions where Federal agencies and 8(a) firms have worked together to ensure that contracts are not awarded competitively. The Department of Energy has been cited for bundling contracts together to limit contracting opportunities to favored minority firms by deliberately undervaluing contracts in order to avoid competition requirements. As a result, of 199 contracts worth \$1 billion, 58 percent went to 13 firms. (Boehner, 1995, pp. 10-11)

In 1991, the United States Commission on Minority Business Development visited 22 Federal sites representing 17 Federal agencies to obtain the data essential to an analysis of current Government-sponsored minority business development programs. One hundred-four individuals were personally interviewed by Commission representatives. These respondents were comprised of Small and Disadvantaged Business Utilization Specialists, Department/Agency Heads, Program Directors and Procurement Officials. What respondents believed is wrong with the 8(a) Program were:

- SBA does not provide required technical and management support.
- SBA personnel are not aware of contractor needs or qualifications.
- Time that it takes for a firm to receive certification and obtain their first contract is too long; process is lengthy, cumbersome and intimidating.
- More viable firms are needed; some contractors who are not qualified to perform should not be in business.
- The program needs to be watched over; some are taking advantage.
- SBA is slow in responding and difficult to work with.
- Businesses have a problem surviving after 8(a) graduation.
- 8(a) contracts are too costly; contracts frequently have high overhead and G&A rates.
- Threshold for competition is too low (\$3 million); it should be raised or removed altogether.
- More contractors are needed in the program and firms should be more educated on the 8(a) Program.
- SBA is not aggressive enough in making the program work or helping people get a better idea as to what the program is.



- It is easier to contract directly with the contractor, rather than have the SBA involved. (Smith, 1992, App. E)

#### **G. ACTIONS AT THE STATE LEVEL**

Efforts to restrict affirmative action are underway, or under consideration, in a number of States. In California, opponents of affirmative action are working to place the California Civil Rights Initiative (CCRI), Proposition 209, on the November 1996 ballot. The CCRI would amend the California Constitution to ban discrimination and preferential treatment based on race, gender, color, ethnicity or national origin in the State's employment, education and contracting systems. California Governor Pete Wilson, who once was a candidate for the 1996 Republican Presidential nomination, has taken steps to dismantle affirmative action in California. On June 2, 1995, he signed an executive order that eliminated or scaled back various affirmative action policies and programs that are not mandated by State or Federal law. At his urging, the Board of Regents of the University of California voted on July 20, 1995, to ban the use of race, religion, gender, color, ethnicity or national origin as a criterion in university admissions, employment and contracting. On August 10, 1995, Governor Wilson filed a lawsuit against his State Government, challenging the constitutionality of several State laws that establish affirmative action hiring and contracting programs. (Bruno, 1995, p. I)



## **VI. POST-ADARAND POLICY ADJUSTMENTS AND PROGRAMS**

### **A. DOD'S FINAL RULE ON SDB CONCERNS**

On April 29, 1996, the DoD issued a final rule amending DFARS Parts 215, 219, 236, 242, 252, and 253 to implement initiatives designed to limit the adverse impact of the suspended DoD's "rule of two" set-aside program. The final rule contains contracting procedures that: (1) expand the use of the evaluation factor for SDBs to include competitive awards based on other than price or price-related factors; (2) consider small, small disadvantaged and women-owned small business subcontracting as a factor in the evaluation of contractor past performance; (3) clarify that the contracting officer will weigh enforceable commitments to use small businesses, SDBs, women-owned small businesses, historically Black colleges and universities and minority institutions more heavily than nonenforceable ones, if the commitment to use such firms is included in the solicitation as a source selection criterion; (4) require prime contractors to notify the contracting officer of any substitutions of firms that are not small, small disadvantaged or women-owned small businesses for the firms listed in the subcontracting plan; and (5) establish a 36-month test program of SDB evaluation preferences that would remove bond cost differentials between SDBs and other businesses as a factor in most source selections for construction acquisitions. (Dees, July 1996, p. 36)

Under the 36-month test program, solicitations that require bonding must require offerors to state bond costs separately in the offer. Bond costs include the costs of bid,

performance and payment bonds. If the apparently successful offeror is other than an SDB concern, DoD must evaluate offers excluding bond costs. If, after excluding bond costs, the apparent successful offeror is an SDB, bond costs are to be added back to all offers, and offers from SDB concerns are to be given an evaluation preference by adding a factor of ten percent to the total price of all offers except those from SDBs and historically Black universities and colleges or minority institutions that have not waived the evaluation preference. (FCR, Apr 1996, pp. 432-433)

Status reports from the military departments and defense agencies are due 18 months and 36 months after the test program commences. The reports must specify the impact of the evaluation preference over each of the reporting periods and must provide recommendations with respect to continuing/modifying the evaluation preference. (FCR, Apr. 1996, p. 433)

## **B. DOD'S INDUSTRY THRUST PROGRAM**

On January 5, 1996, to help offset DoD's decision to suspend the "rule of two" set-aside program, the Under Secretary of Defense for Acquisition and Technology, Dr. Paul Kaminski, has directed the Services to increase substantially their efforts in support of SDBs (Ireton, Apr 1996, p. 39). Consequently the Department of Defense Office of Small and Disadvantaged Business Utilization (OSADBU) has initiated an "Industry Thrust Program" to bring more SDBs into the defense industrial base. The program would concentrate on five major industry areas and will seek to provide increased awareness of DoD contracting and subcontracting opportunities to SDBs, women-owned businesses,

historically Black colleges and universities and minority institutions. The targeted industries are environmental, manufacturing, health care, telecommunications and management information systems. One mechanism being used to increase this awareness is a series of informational conferences for each of the targeted industries, addressing DoD procurement opportunities in each of the five targeted industries. (FCR, Jan 1996, p.50)

Presentations and workshops during these conferences bring together key members from contracting, technical and program offices on the industry THRUST areas. All conferences present experts in the various industry THRUST areas and conduct workshops by defense agency representatives. The first THRUST conference on "environmental" took place in March 1996 in San Antonio, Texas, and was hosted by the Air Force. The second conference on "telecommunication" was hosted by the Defense Information Agency (DIA) and took place in May 1996 in Vienna, Virginia. A conference on "management information and simulation" was held in May 1996 in Oxnard, California. Conferences on "manufacturing" and "health care" are being scheduled. (Thrust, 1996, p. 1)

#### **C. PROPOSAL FOR HUBZONE ACT OF 1996**

On February 27, 1996, Senator Christopher Bond (Republican-Missouri), chairman of the Senate Small Business Committee, introduced S. 1574, the Historically Underutilized Business Zones Act of 1996 (the HUBZone Act). This legislation is intended to make small businesses located in economically distressed urban and rural areas eligible for Government contract set-asides and preferences in receiving Government

contracts. The bill is intended to create new opportunities for small businesses in urban and rural communities that have suffered economic decline while creating job opportunities for the hundreds of thousands of unemployed. The bill was referred to the Senate Small Business Committee, which held a hearing on March 21, 1996 (Bond, 1996, p. 1). However, the legislation (S. 1574) has not yet been completed as of July 1996 (Ireton, August 1996, p. 42).

“*HUBZone*” is defined as any area located within a qualified metropolitan statistical area or qualified non-metropolitan area. “*Small business concern located in a HUBZone*” is defined as a small business whose principal office is located in a HUBZone and whose workforce includes at least 35 percent of its employees from one or more HUBZones. “*Qualified Metropolitan Statistical Area*” is defined as an area where not less than 50 percent of the households have an income of less than 60 percent of the metropolitan statistical area median gross income as determined by the Department of Housing and Urban Development. “*Qualified Non-metropolitan Area*” is an area where the household income is less than 80 percent of the non-metropolitan area median gross income as determined by the Bureau of the Census of the Department of Commerce. (Bond, 1996, p. 1)

Under this proposed bill, small business opportunities would be created by non-race or gender-based preferences. That is, to be eligible, a small business would have to be: (1) owned and controlled by one or more U.S. citizens; (2) located in a HUBZone; and (3) a minimum of 35 percent of its work force would have to reside in the HUBZone.

The small business would have to certify to the Small Business Administration that it is located in a HUBZone, that it will comply with certain subcontracting rules, and perform at least 50 percent of a contract in a HUBZone unless the terms of the contract require that performance be elsewhere. The SBA would have full authority over the HUBZone program, including its administration and enforcement. (Dees, May 1996, p. 32)

The legislation provides for competitive set-asides of contracts estimated to exceed the simplified acquisition threshold for HUBZone small businesses if SBA determines that at least two qualified businesses are expected to bid and whether award will be at a fair market price. For contracts estimated to exceed the simplified acquisition threshold but less than \$5 million, award on a sole-source basis is required upon determination by head of agency that a responsible HUBZone business has submitted a reasonable and responsive offer. A ten-percent evaluation preference can be applied in full and open competition. (Ireton, May 1996, pp. 39-40)

The legislation also specifies that a procurement may not be made from a source on the basis of a preference under the 8(a) Program if the procurement would otherwise be made from a different source under this legislation. Further, the legislation would amend section 8(d) of the Small Business Act to add HUBZone small business eligibility. The Small Business Act is amended to give qualified small business concerns located in HUBZones a higher preference than small business concerns owned and controlled by socially and economically disadvantaged under 8(a) Program (Bond, 1996, p. 2). The Act would set forth Government-wide goals for HUBZone small business participation in

Federal prime contracts of at least one percent for FY 1997, two percent for FY 1998, three percent for FY 1999, and four percent for FY 2000 and beyond. (Ireton, May 1996, p. 40)

#### **D. EMPOWERMENT CONTRACTING**

On May 21, 1996, President Clinton signed the Executive Order 13005 on Empowerment Contracting, which aims to encourage business activity in "economically distressed communities" by providing incentives (including a price or evaluation credit) to qualified large and small business concerns (published in Federal Register on May 24, 1996). The order says "fostering growth of Federal contractors in economically distressed communities and ensuring that those contractors become viable businesses for the long term will promote economy and efficiency in Federal procurement and help to empower those communities." The executive order does not need congressional approval; therefore, it became effective immediately upon signing of the order. (FCR, May 1996, pp. 551-552)

Under the order, the term "*economically distressed communities*" is defined, for urban and rural communities, as any census tract that has a poverty rate of at least 20 percent or any designated Federal empowerment zone, supplemental empowerment zone, enhanced enterprise community or enterprise community. In addition, a rural or Indian reservation area may be designated as an area of general economic distress after considering the following factors: (1) unemployment rate; (2) degree of poverty; (3) extent of out migration; and (4) rate of business formation and business growth. (Ireton,



Aug. 1996, p. 42)

Within 90 days, the Secretary of Commerce is required to draft the necessary rules, regulations and guidelines to grant qualified large and small businesses incentives designed to encourage them to do business in economically distressed communities. The incentives are not clearly defined in the order yet, but they may include a price or evaluation credit to be used in assessing offers for Government contracts in unrestricted competition, i.e., competitions not reserved specifically for certain minority groups. (Ireton, Aug. 1996, p. 42)

Similar to HUBZone Act legislation, qualified large businesses must employ a significant number of residents from the community and have either a significant physical presence in the area or a direct impact on generating significant economic activity in that area. A qualified small business, however, must meet only one of three criteria: (1) employs a significant number of residents from the economically distressed area; (2) has a significant physical presence in the area; or (3) has a direct impact on generating significant economic activity in the area. (Ireton, Aug. 1996, p. 42)

#### **E. PROPOSAL BY THE DEPARTMENT OF JUSTICE**

On May 23, 1996, the Department of Justice (DOJ) published a proposal in the Federal Register to reform affirmative action programs in Federal procurement. The bill is President Clinton's continuing effort to uphold the pledge, which he announced in July 1995, to "mend" rather than "end" affirmative action. The proposal presents a concept for managing SDB set-aside and preference programs, including the 8(a) Program. The

DOJ's proposal would most likely require an immediate two-year suspension of all race preference set-aside programs. The final rules are scheduled to be drawn up by the end of the year. There are five major elements to the DOJ program: eligibility and certification, benchmark limits, mechanisms for increasing minority opportunity, interaction of the benchmark limits and the mechanisms and outreach and technical assistance. (Ireton, Aug. 1996, p. 40)

#### **1. Eligibility and Certification**

The proposal establishes new small disadvantaged business certification requirements to ensure that only genuine SDBs, rather than front companies for non-SDB firms, benefit from the proposed race-conscious methods. The new requirement would not impact SDBs that participate in the SBA's 8(a) Program. SBA would continue to be the sole certifying authority for 8(a) Program, and 8(a) firms would be automatically qualified for SDB participation. (Dees, Jul. 1996, p. 35)

For all other bids, every applicant would be required to submit with each bid a certification that the business is owned and controlled by designated *socially and economically disadvantaged* individuals, and each bid would have to be accompanied by a form certifying that the firm qualifies for minority status. For these applicants, the certification process will be managed by the agency to which the bid is submitted, not by a central certification authority. Once certified by an agency, the SDB's name will be entered into an online database to be maintained by SBA. That certification will remain valid for up to three years; during that period, the SDB will only have to complete a part

of the certification form to continue eligibility. To maintain eligibility, a new complete application must be submitted every three years (Ireton, Aug. 1996, p. 39). Up to this point, SDBs have used self-certification process, which has been found to be prone to abusive.

Members of designated minority groups continue to fall under the statutorily mandated presumption of social and economic disadvantage as defined in section 8(d) of the Small Business Act. Applicants will be required to state the group identification under which social and economic disadvantage is claimed. Challenges to a business' eligibility will be resolved by SBA through existing mechanisms (Ireton, August 1996, p. 40). SBA and DOJ will undertake a coordinated effort to conduct periodic audits of certified firms and prosecute firms that misrepresent their eligibility. (Dees, Jul. 1996, pp. 35-36)

Individuals who do not fall under the definition of Section 8(d) may establish social and economic disadvantage by answering a series of questions demonstrating such disadvantage. While economic disadvantage must be demonstrated according to criteria established by SBA, social disadvantage must be shown by clear and convincing evidence. This change is expected to open participation in SDB programs to more women and non-minorities. (Ireton, Aug. 1996, p. 40)

For the most part, contracting officers would not have final authority to make eligibility determinations; however, quick decisions must be made so that the procurement process is not delayed and applicants have a fair opportunity to compete. The responsibility may be assigned to the agency's Office of Small and Disadvantaged Business

Utilization or to SBA. (Ireton, Aug. 1996, p. 40)

## **2. Benchmark Limits**

Under this affirmative action proposal, statutory contracting goals would still apply (i.e., five-percent minority goal under the Small Business Act Section 15(g)(1)), but agencies would not be able to use race-based programs to achieve them unless the Government determines that minority-owned firms in a specific industry are being discriminated against. Agencies would be limited in their use of race-based contract awards by a set of guidelines or benchmarks to be developed by the Commerce Department, GSA and the SBA. The purpose of the benchmarks is "to ensure that race-conscious procurement is not used unnecessarily." Benchmarks for each industry would be adjusted every five years on the basis of new data from the Census Bureau and would be based on the "level of minority contracting that one would reasonably expect to find in a market" if there were no discrimination in the market place. (Dees, Jul. 1996, p. 36)

Once markets have been identified, minority business capacity will be measured using primary census data. One factor considered would be the number of minority SDBs available and qualified to perform Federal contracts. Calculations will not include minority-owned firms owned by federally recognized Native American tribes and Alaskan native villages, as bidding credits for such corporations are not subject to the *Adarand* strict scrutiny standard. DOJ may also consider the number of employees and revenues, as well as any evidence that minority business formation and operation in a specific industry that may have been suppressed by discrimination such as in obtaining credit, surety

guarantees, licenses, and in pricing and contract awards. (Ireton, Aug. 1996, pp. 40-41)

### **3. Mechanisms for Increasing Minority Opportunity**

Where race-neutral mechanisms under the "benchmark limits" fail, minority opportunities in Federal contracting may be increased through the use of following "race-conscious" mechanisms: (1) the SBA 8(a) Program; (2) bidding credits for SDB prime contractors; (3) evaluation credits for non-minority prime contractors that use SDB subcontractors; and (4) aggressive agency outreach and technical assistance programs. (Ireton, Aug. 1996, p. 41)

The 8(a) Program will continue to be available; however, the test of "benchmark limitations" would be applied. Ten-percent price bidding credits for SDB prime contractors are already authorized for the DoD (10 U.S.C. 2323) and for the rest of the Federal Government under the Federal Acquisition Streamlining Act of 1994. Goals for the utilization of SDB subcontractors by non-minority prime contractors are to be established by the agency based on the availability of minority firms to perform the work. These evaluation credits are supplemental to those set forth in Section 8(d) of the Small Business Act. (Ireton, Aug. 1996, p. 41)

### **4. Interaction of Benchmark Limits and Mechanisms**

If an agency lets fewer contracts for a particular type of work than the benchmark (race-neutral method) indicates are possible, it would be allowed to use "race-based" methods (including a price or evaluation credit, but no set-asides) to increase its awards to minority firms in that industry (through the use of any of the three special contracting

methods). But if the agency meets or exceeds the benchmark, it would have to restrict its use of such techniques and adjustments would have to be made. (Dees, Jul. 1996, p. 36)

The Department of Commerce will review data from the GSA Federal Procurement Data center for the preceding three fiscal years for all transactions exceeding \$25,000 for all two-digit SIC codes, considering SDB participation in direct contracting, 8(a) and SDB prime and subcontracting programs. Mechanisms will then be adjusted. If the data indicate failure to meet the benchmark, agencies would be authorized to grant credits to SDB bidders and to prime contractors for SDB subcontracting. (Ireton, Aug. 1996, p. 41)

Agencies will be required to report the number of contracts awarded using "price bidding" or "evaluation credits," as well as the amount of the credits. If the Commerce Department, based on data evaluation, determines that using race-conscious measures is not justified in a particular industry or region, use of the price bidding or evaluation credits will be disallowed. (Ireton, Aug. 1996, p. 41)

Because the DOJ proposal is expected to call for a two-year moratorium on the use of race-conscious mechanisms, the DOJ proposal does not permit the use of the competitive SDB set-asides. The Department of Justice stated that "following the initial two-year period of the reformed system's operation (and at regular intervals thereafter), however, Commerce, SBA, and DoD will evaluate the operation of the system and determine whether this statutory power to authorize set-asides should be invoked." (Ireton, Aug. 1996, p. 41)

Contracts awarded in the 8(a) Program will be counted in calculating whether minority participation has met or exceeded the benchmark limits. If Commerce Department determines that use of race-conscious mechanisms is to be suspended in an industry, one or more of these actions may be taken in the 8(a) Program: (1) limit entry of businesses into the program in that industry; (2) accelerate graduation for firms that "do not need the full period of sheltered competition to satisfy the goals of the program" and (3) limit the number of 8(a) contracts by industry or geographic area. These same actions may be taken to ensure that 8(a) contracting is not concentrated in specific regions.

(Ireton, Aug. 1996, p. 41)

#### **5. Outreach and Technical Assistance**

To minimize the use of race-conscious methods and at the same time to meet the DOJ objectives, the proposal urges agencies to continue to engage in outreach and technical assistance activities designed to make minority firms aware of contracting opportunities and to help them take advantage of those opportunities. (Dees, July 1996, p. 36)





## VII. SURVEYS, STATISTICS, AND POLITICAL ENVIRONMENT

### A. AFFIRMATIVE ACTION SURVEY

Some of the polls conducted in 1995 shed some light on where the American people stand on preferential treatment: (Boehner, 1995, p. 1)

(1) What is the best thing to do with affirmative action programs? (CNN/Gallup poll, March 17-19, 1995)

- |                           |            |
|---------------------------|------------|
| - Change them:            | 47 percent |
| - Do away with them:      | 28 percent |
| - Leave them as they are: | 23 percent |

(2) How often do you think affirmative action programs designed to help women and minorities get better jobs or education end up using quotas? (Los Angeles Times, March 4-9, 1995)

- |                 |            |
|-----------------|------------|
| - A lot:        | 53 percent |
| - Occasionally: | 28 percent |
| - Almost never: | 5 percent  |
| - Don't know:   | 14 percent |

(3) How do Californians feel about the affirmative action? (California Opinion Poll, June 1995)

- |                   |            |
|-------------------|------------|
| - Eliminate all:  | 15 percent |
| - Eliminate many: | 35 percent |
| - Keep many:      | 26 percent |
| - Keep all:       | 14 percent |
| - Undecided:      | 10 percent |

(4) A measure has been proposed in Congress that would make it unlawful for any

employer to grant preferential treatment in hiring to any person or group on the basis of race, national origin or gender. Do you favor or oppose? (Los Angeles Times, January 19-22, 1995)

- Favor: 73 percent
- Oppose: 23 percent

## **B. VOTING RECORDS ON CIVIL RIGHTS LEGISLATION**

Republicans, in general, appear to have stronger congressional voting records on civil rights legislation than the Democrats. For example:

(1) The Civil Rights Act of 1964 - Landmark civil rights legislation prohibiting discrimination on the basis of race, among other things. The bill received the support of:

- 90 percent of House Republicans and 82 percent of Senate Republicans; and
- 61 percent of House Democrats and 69 percent of Senate Democrats.

(2) The Voting Rights Act of 1965 - Banned the use of literacy tests and poll taxes in elections. The bill received the support of:

- 82 percent of House Republicans and 94 percent of Senate Republicans; and
- 78 percent of House Democrats and 73 percent of Senate Democrats.

(3) Civil Rights Act of 1991 - Strengthened civil rights protections against discrimination on the basis of race, sex and national origin, among other things. Eighty percent of House Republicans voted for the final bill.

## **C. STATISTICS AND PROGRESS IN SMALL DISADVANTAGED BUSINESS**

## **1. Statistics and Progress in Federal Procurement**

In fiscal year 1976, less than one percent of all Federal procurement was awarded to minority business enterprises (Stephanopoulos, 1995, p. 57). In 1986, total prime contracts approached \$185 billion, yet minority business received only \$5 billion in prime contracts, or about 2.7 percent of all Federal prime contract dollars. In 1990, African Americans accounted for 12.1 percent of the population but they owned only 3.1 percent of the total business and 1.0 percent of receipts of all U.S. firms. That same year, Hispanic Americans accounted for nine percent of the population, but only 3.1 percent of U.S. businesses and 1.2 percent of all receipts. The typical minority firm has annual receipts that are less than half that of white-owned firms. And while in 1987 the average payroll among white-owned firms with employees was \$85,786, for minority-owned firms the average payroll was \$38,318. (Stephanopoulos, 1995, p. 58)

Fiscal Year 1994 statistics indicate significant improvement in SDB contracting in Federal procurement; 6.5 percent (\$10.6 billion) of the total Federal contracts awarded (\$163.4 billion) were awarded to SDBs. In FY 94, total DoD contracts (\$112 billion) made up 68.5 percent of all Federal contracts awarded. (Stephanopoulos, 1995, p. 58)

However, the share of Federal procurement dollars going to women-owned businesses has been limited. In 1985, for example, only 0.6 percent of all Department of Defense prime contract awards went to women-owned businesses. While that percentage has climbed steadily, it has climbed slowly, reaching only 1.7 percent for 1994. (Stephanopoulos, 1995, p. 58)

Overall, Federal contract statistics on minority concerns look much more favorable compared to the statistics on minority employment. For example, the 1995 Glass Ceiling Report, sponsored by Republican members of Congress, reported that in the nation's largest companies only six-tenths of one percent of senior management positions are held by African Americans, four-tenths of a percent by Hispanic Americans and three-tenths of a percent by Asian Americans. Women hold between three and five percent of these positions, while white males make up 43 percent of American workforce but hold 95 percent of senior management positions. (Clinton, 1995, p. 6)

## **2. Statistics and Progress in DoD Procurement**

DoD Office of Small and Disadvantaged Business Utilization reported that it has exceeded the five-percent annual goal, which is mandated by Title 10, United States Code (U.S.C.) 2323 of Small Business Act, for four consecutive years since FY 1992. DoD has initiated three separate self-imposed SDB goals to achieve the five-percent goal: (1) five-percent SDB prime contracting goal; (2) five-percent SDB subcontracting goal; and (3) five-percent historically Black colleges and universities and minority institutions prime contracting goal. (Gill, 1995, p. 3)

For DoD, FY 1994 represented a record year in terms of SDB percentage accomplishment. Furthermore, FY 1994, marks the first time that the DoD prime and subcontract awards to SDBs surpassed the five-percent mark within their respective data base. During FY 1994, DoD awarded \$112 billion in *prime contract* awards to U.S. business concerns and \$6.1 billion to SDB concerns. This success represents 5.5 percent

of total DoD expenditures. (Gill, 1995, p. 1)

DoD reported that major prime contractors also registered unparalleled success in the SDB *subcontracting* program. Prime contractors reported \$2.3 billion or 5.0 percent in subcontract awards to SDB firms during FY 1994, out of a total subcontract award base of \$45.4 billion. Fiscal Year 1994 represents the first year that DoD achieved the five percent subcontracting goal since the Public Law 100-656 established in 1988 a Government-wide procurement goal for SDBs at not less than five percent of the total value of all prime contracts and subcontracts, respectively (Committee, 1995, p. 633). This five percent subcontracting accomplishment marked a first time in the history of the DoD subcontracting program. In terms of dollars, prime contractors have increased their subcontract awards to SDBs by \$350 million over their previous high dollar total of \$1.9 billion in FY 1993. This subcontracting performance equates to a 17.7 percent increase in dollars over their FY 1993 accomplishment. (Gill, 1995, p. 1)

During FY 1994, DoD awarded \$33 million in contracts to historically Black colleges and universities and minority institutions. This represents 6.1 percent of all awards to higher education institutions which totaled \$1,327 million in FY 1994. (Gill, 1995, p. 1)

Analysis: The suspended DoD "rule of two" program was the third largest SDB contract award category for the Department of Defense, out of the four (i.e., 8(a), Direct, "price evaluation preference," and "rule of two"), which had been available for SDBs. Based on the historical data, the impact of abolishing the DoD "rule of two" program on

the Department of Defense would have been:

- For year 1993: The DoD "rule of two" program made up 0.86 percent of the total DoD contracts awarded in 1993. Combined SDB contracts made up 5.3 percent of the total DoD contracts awarded in 1993. If the "rule of two" had been suspended in 1993, 4.44 percent of the total DoD contracts would have been awarded to SDBs in 1993, assuming none of the lost contracts had been re-directed to 8(a) or other programs.

- For year 1994: Likewise, the DoD "rule of two" program made up 0.97 percent of the total DoD contracts awarded in 1994. Combined SDB contracts made up 5.5 percent of the total DoD contracts awarded in 1994. If the "rule of two" had been suspended in 1994, 4.53 percent of the total DoD contracts would have been awarded to SDBs in 1994.

- For years 1995 and 1996: Impact on years 1995 and 1996 would depend on the degree of agencies' efforts to redistribute and make greater use of the 8(a) Program, as directed by Dr. Kaminsky, the Under Secretary of Defense Acquisition and Technology. In any event, based on the historical trend, the impact on DoD for years 1995 and 1996 should be less than one percent of the total DoD contracts awarded.

### **3. Fallacy in Statistics**

Some of the commentaries and ensuing statistics provide valid points yet appear to present less than a complete picture of statistics of minority enterprises. For example, "The New Republic" magazine commented that "when the numbers are examined honestly, minority businesses turn out to be over-represented; rather than under-

represented, in Federal procurement. In 1994, 25 percent of all Federal dollars awarded to small business went to minority businesses, although minorities own nine percent of small businesses in the country. The administration tries to conceal this number by emphasizing that only 4.1 percent of all Federal procurement dollars went to minority businesses, but this is the wrong comparison. Most procurement dollars go not to small businesses but to huge Fortune 500 companies, such as Lockheed and Exxon, that have no ethnic corporate identity but are owned by shareholders of all races." (Rosen, 1996, p. 26)

The preceding commentary provides some valuable insights; nevertheless, it is important to realize that, while only nine percent of all small businesses in the country may be owned by minorities, African and Hispanic Americans alone represent over 21 percent of the total U.S. population. Therefore, a caution should be exercised to take both the census and commerce data/statistics into consideration when analyzing the equitable distribution of Federal contracts.

#### **D. ANALYSIS OF THE LATEST POLITICAL ENVIRONMENT**

Affirmative action is a highly controversial socio-political issue and public policy. Supporters insist that affirmative action and race-based preferential programs should remain in place to combat the effects of discrimination against minorities and women, which they believe still widely exists, and to ensure and maintain equal opportunity for all. Opponents contend that affirmative action embraces reverse discrimination in favor of minorities and women, arguing that affirmative action was originally intended as a temporary remedy but unfortunately has remained for three decades and has transformed

into subject of wide misuse and abuse.

Critics of affirmative action have offered a wide range of alternatives. Some favor basing preferences on newly defined socioeconomic class rather than race, ethnicity or gender, while others propose replacing race and gender-based preferential policies with vigorous anti-discrimination efforts (Bruno, 1995, p. I). Still others call for various types of Government actions or programs to reach out and inform minority and women-owned enterprises of business opportunities, without giving them preferential treatment in awarding contracts.

Proponents of affirmative action have bitterly opposed any legislative proposal that would amend or curtail the use of set-aside programs. They have recently (in June 1995) formed a new coalition called "Americans for a Fair Chance," which is comprised of six civil rights groups: the National Women's Law Center, the Mexican American Legal Defense and Education Fund, the Lawyers Committee for Civil Rights Under Law, the National Asian Pacific American Legal Consortium, the NAACP Legal Defense and Education Fund and the Women's Legal Defense fund. The objective of the coalition is to defend affirmative action against negative action by Congress, state legislatures and the courts and to "educate the public about how affirmative action benefits women, minorities, and the nation." (CNN, 1996, pp. 1-2)

Following the November 1994 elections, in which Republicans gained control of both the House and the Senate, affirmative action emerged as a key legislative issue. The 104th Congress approved, and the President signed, a measure (P.S. 104-7) repealing



a program that allowed companies selling broadcast stations or cable television systems to minority-owned businesses to defer capital gains taxes. Other bills have been introduced in the 104th Congress to restrict affirmative action programs. Among them are measures to ban preferential treatment in employment, and to prohibit discrimination and preferential treatment with respect to Federal employment, contracts and programs.

(Bruno, 1995, p. i)

The June 1995 landmark Supreme Court's decision on *Adarand* case and the upcoming November 1996 Presidential election further sparked the race between the Republicans and Democrats, who were trying to fine-tune campaign themes, to initiate new legislation, as well as proposing new programs that they respectively believe would meet the *Adarand* scrutiny. Even within the same party line, the presidential candidates have jockeyed for position, most notably amongst the Republican candidates, in taking the legislative initiatives to reform or repeal existing programs. The majority of the GOP candidates' emphasis has been to introduce legislation that would have a broader implication on the affirmative action Federal procurement programs, whereas the Democrats, in general, have quietly stood behind President Clinton's central theme to "mend it, but don't end it," which has been more of a pro-affirmative action and more politically in line with the public opinion polls (Clinton, 1995, p. 11). President Clinton's subsequent actions and coordinated effort with the Department of Justice continues to suggest his basic support for affirmative action. Democrats have often claimed that Republicans were trying to make race and gender a controversy in the upcoming election.

President Clinton's view on affirmative action appears to be: "It should be changed now to take care of those things that are wrong and it should be retired when its job is done. I am resolved that that day will come. But the evidence suggests - indeed, screams - that that day has not come." (USA, 1996, p. 1) So far, the administration has issued an executive order (Empowerment Contracting), coordinated with the Department of Justice to produce the latest DOJ proposal, and suspended the DoD "rule of two" program.

Senator Dole's view on affirmative action appears to be: "You don't cure the evil of discrimination with more discrimination. . . Should there be preferences? Should there be quotas? My view is maybe at a time there should have been, but I think now we've reached a point where we need to move on." Senator Dole, a former affirmative action supporter, however, has modified his position notably since 1995. Senator Dole co-sponsored the Dole-Canady bill (Equal Opportunity Act of 1996), which would prohibit the Federal Government from granting any preferences on the basis of race, color, national origin or gender in connection with any Federal contract, employment or any other federally conducted program. (USA, 1996, p. 2)

On July 15, 1996, Republican congressional leaders modified their position and stated that they will not press for an end to all of the Federal Government's affirmative action plans this year and instead will concentrate on repealing a program (specifically the 8(a) Program) that requires Federal contracts to go to "disadvantaged" businesses. Although they remain committed to eliminating race or sex-based preferences, expressing

concerns that time is limited this summer to push the issue, House Speaker Newt Gingrich (Republican-Georgia) and Senate Majority Leader Trent Lott (Republican-Mississippi), confirmed that they will not push for a vote on a Dole-Canady bill. Instead, the Grand Old Party (GOP) has decided that it would be more appropriate to press for passage of a bill sponsored by Republican Jan Meyers (Republican-Kansas), i.e., proposals to abolish the 8(a) Program which awarded \$5.8 billion of Federal procurement set-aside contracts in FY95 to *socially and economically disadvantaged* individuals. The latest move by Republican leaders also appears to be falling in line with the latest polls, which indicate that while most Americans favor making changes to affirmative action programs, only about one-quarter of those surveyed want to abolish programs outright. (McAllister, 1996, pp. 1-2)

The Leadership Conference on Civil Rights, a civil rights lobbyist group that has been in the forefront of efforts to save affirmative action programs, suggested that the latest Republican move may reflect their concern for the support from moderate Republicans who support affirmative action. Civil rights lobbyists also expressed doubt that the GOP leadership had the votes to get the broader measure through the Senate. They also claimed that women voters and retired General Colin L. Powell may have played major roles in the GOP decision (McAllister, 1996, p. 2). On the other hand, if the GOP pushes its bill to the floor, it may receive overwhelming Republican support and also attract quite a few moderate Democrats who favor the measure (Thernstrom, 1996, p. 11). But, based on the indications shown thus far, the party affiliation and ensuing

pressure would most likely prompt the law makers to vote along the party line, thus favoring the measure.

Women, who have been one of the chief beneficiaries of many affirmative action programs, would also be adversely affected by the proposed change. Powell, a Republican who has rejected overtures to get involved in the party's presidential campaign, has been speaking out in favor of retaining the programs and his opinion may have influenced a number of GOP lawmakers. One can deduce that the Republican party may be concerned about potential backlashes from minorities, women and civil rights groups if they push the agenda too far before the upcoming election (McAllister, 1996, p. 2). Therefore, although affirmative action may have been one of the central themes amongst the earlier Republican presidential candidates, the fervent may have begun to subside with the concern for the upcoming election. It appears that the Democratic Party, which has taken a more moderate view of the affirmative action (in all reality, reaffirming the program and proposing to mend only as necessary) has stayed more consistently behind President Clinton's policy which he delivered before the National Archive in July 1995.

## **VIII. CONCLUSIONS AND RECOMMENDATIONS**

### **A. ANALYSIS OF PROPOSED PROGRAMS AND LEGISLATION**

#### **1. Analysis of the Equal Opportunity Act of 1996**

Although the Dole-Canady bill has a wider implication on Federal procurement than other measures proposed by Democrats and Republicans alike, its implication is not as far reaching as many would believe. Nothing in the Dole-Canady legislation would prevent state and local governments from continuing their affirmative action programs. Only the measure similar to the one proposed by Governor Pete Wilson of California (i.e., California Civil Rights Initiative) would outright abolish the affirmative action programs at the state level.

One remedy provided in the provision (i.e., Anti-discrimination Act) for containing discrimination would not provide as much protection for minorities and women in procurement as well-structured affirmative action would provide. Individual litigation challenging subtle discrimination in complex circumstances is often difficult to detect and prove. Because the courts are already overburdened and litigation is often prohibitively expensive and protracted, much of the minority business concerns would be discouraged from challenging racial and gender discrimination.

A political drawback of this legislation is that it is fiercely opposed by the civil rights groups and would most likely be unwelcome by the greater part of minority and woman groups. In addition, aside from the lawmakers' personal conviction, it appears to

be out of line with general public polls, which favor changing the affirmative action vice abolishing it.

## **2. Empowerment Contracting v. HUBZone Act**

Empowerment Contracting appears to be the Clinton Administration's effort to pre-empt the similar effort (i.e., HUBZone Act) introduced by Republican Senator Bond in February 1996. Empowerment Contracting resembles and closely follows the HUBZone Act, and basically embraces the same fundamental concept. Specifically, both programs appear to be the products of the political parties' attempt to comply with the constitutional standards (i.e., effort to apply "strict scrutiny," "compelling interest" and "narrow tailoring" to overcome past discrimination) set forth in the U.S. Supreme Court's decision in *Adarand* case. Both programs emphasize the use of racial and gender-neutral socioeconomic criteria, i.e., hiring of employees residing in the "economically distressed community" under Empowerment Contracting and similarly hiring of employees residing in the "economically distressed urban and rural communities" under HUBZone Act.

Differences do exist, however, and they are:

(1) HUBZone Act is limited only to qualified *small* businesses, whereas Empowerment Contracting expands its application to both qualified *large and small* businesses (similar to Labor Surplus Area Preference program).

(2) Also, in Empowerment Contracting, a small business may be exempt from employing a significant number of residents from the "economically distressed communities" as long as it can establish a significant physical presence in the targeted area

and/or provide a direct impact on generating significant economic activity in the area.

Whereas, under HUBZone Act, an eligible small business must hire at least 35 percent of its workforce from the so called HUBZone.

(3) Empowerment Contracting does not set forth a minimum goal for awarding contracts to qualified business concerns each year, whereas the HUBZone Act specifies Government-wide percentage goals for awarding contracts to qualified small business concerns for each year.

Both the HUBZone Act and Empowerment Contracting seem to be consistent with Dr. Martin Luther King Jr.'s quotation that people should "not be judged by the color of their skin but by the content of their character." It appears that neither program is designed to be used as a primary "stand alone" package, i.e., at least not during the first few years of implementation phase. Perhaps, achieving the five percent statutory goal of awarding contracts to SDB concerns may be difficult to maintain during the implementation phase for either HUBZone Act or Empowerment Contracting. Therefore, if one of the options is implemented, it should be used in conjunction with DOJ's proposal, but should take precedence over the 8(a) Program.

It is also noteworthy to mention the similarities and difference between the two programs and the Labor Surplus Area (LSA) Preference program. Both programs bear resemblance to the LSA Preference program in that they both set-aside contracts based on race and gender-neutral criteria. But they differ from the LSA Preference program in that they both require some effort to hire "workforce" from the targeted areas, whereas the

LSA program only requires that 50 percent or greater of the "contract performance cost" be incurred in the labor surplus area.

### **3. Analysis of the DOJ Proposal**

DOJ proposes a two-year suspension of all race preference set-aside programs. In all reality, however, the two-year moratorium already has applied to DoD's SDB set-aside program ("rule of two"), which was suspended indefinitely in October 1995. By proposing to keep the SBA's 8(a) Program alive, DOJ is indirectly implying that the 8(a) Program is not considered a set-aside program (since it has a connotation of being a business development program). Therefore, the use of the 8(a) Program should be justified only if used as a supplementary mechanism when the "benchmark limits" test fails. However, the proposed feature that limits the number of 8(a) contracts by industry or geographic area should help alleviate the problems of concentrating disproportionately a large percentage of 8(a) contracts in certain geographical areas, which was one of the major findings by the GAO.

One of the other key features of the DOJ proposal is the implementation and enforcement of "formal certification process" for using any set-aside program. So far, the only set-aside program that used formal certification is the SBA's 8(a) Program. Other set-aside programs only required self-certification, which has been subject to wide abuse. Even with formal certification process, the 8(a) Program has been found to be subject to abuse by "front companies."

DOJ's proposal under the GOP banner continues the President Clinton's



commitment to “mend, but not end” affirmative action. In the process, it still authorizes the use of the controversial race-based definition of *socially disadvantaged* and also permits the use of race-conscious Government contracting where a disparity study or evidence shows minority or women under-representation in the areas of Federal contracting. The basis for this type of proposal may be the Clinton Administration’s concern that a sudden shift away from affirmative action may setback the great progress that has been made in SDB contracting in the last few years.

DOJ also allows for the continued application of the existing statutory requirement for awarding five percent of Federal contracts to minority business concerns, which essentially implies DOJ’s acceptance of “numerical goal” or “quota.” This portion of the DOJ proposal appears to be contradicting President Clinton’s commitment to eliminate or reform any program that creates a quota.

## **B. CONCLUSION**

In general, the overall GOP approach on the affirmative action in Federal contracting has been to implement sweeping changes that would have a broader implication on affirmative action than the Clinton Administration intends to do. The GOP’s approach in 1995 and early 1996 almost casts an anti-affirmative action movement. Upon closer inspection, however, the GOP does not oppose legitimate affirmative action efforts that focus on outreach, recruitment and marketing. They do, however, oppose quotas, set asides and preferences that mandate outcomes and undermine equal opportunity, and Republicans seem to believe that is what affirmative action has really

been transformed into today.

Former Republican Presidential candidate Pete Wilson, the Governor of California, appears to have set the initial anti-affirmative action tone in June 1995 as a part of his effort to earn the Republican nomination. Since then, the post-*Adarand* legislative proposals by Republicans (i.e., Gramm, Franks and Dole-Canady bills) have become difficult to distinguish from one another, all favoring abolishment of set-aside programs that embrace racial and gender preferences. Until the introduction of a more moderate version of Senator Bond's HUBZone Act in February 1996 and Representative Meyer's plan to propose a legislative action to end the 8(a) Program, GOP's effort has been behind the Dole-Canady bill, which was originally initiated by Congressman Canady. With only a few months left before the election, for unknown reasons, the GOP has suddenly shifted its momentum and turned away from its hard-line position of pushing the Dole-Canady bill (Equal Opportunity Act of 1996).

Questions may be asked. Has the GOP lost the impetus they first had when they took over the 104th Congress in 1994 and also the momentum they created in 1995 in affirmative action? Or is it simply an election year jitter? Will they return to the hard line position after the November election?

The Clinton Administration, on the other hand, has stayed relatively consistent with its support for affirmative action in Federal contracting since the President's speech before the National Archive in July 95, and has stayed closer to the general public opinion polls, which favored changing or keeping the affirmative action vice abolishing the

program. President Clinton's signing of the executive order (Empowerment Contracting) and coordination with the Department of Justice to announce the latest proposal appear to be continuing the effort to keep affirmative action in Federal contracting alive, yet change it as necessary to fit the socio-political climate.

Interestingly, President Clinton's Empowerment Contracting appears to mimic Senator Bond's earlier effort (i.e., HUBZone Act). It basically embraces the same rhetoric with a slightly different flavor. Likewise, earlier Republican legislative proposals were almost indistinguishable from one another, with similar rhetoric. With the introduction of the HUBZone Act and Empowerment Contracting, both Democrat and Republican views may have somewhat begun to merge, i.e., now both views support a gradual transition rather than a sudden exit from the affirmative action through the implementation of race and gender-neutral mechanism and, at the same time, allow a limited use of race-based set-aside programs.

Neither the HUBZone Act nor Empowerment Contracting entirely does away with the race or gender connotation. However, they both place primary emphasis on the race-neutral ground of socioeconomic disadvantage. Also, both the HUBZone Act and Empowerment Contracting seem to offer a more race-neutral option than the DOJ proposal, which still applies the race-conscious definition of *socially disadvantaged* in the certification process. It is interesting to note that even after the issuance of "strict scrutiny" and "narrowly tailored" and "compelling interest" in *Adarand* decision, DOJ still embraces a race-conscious mechanism in its certification process.

A drastic and far-reaching trend away from affirmative action in Federal contracting is also less desirable from a judicial perspective. After all, the Supreme Court's landmark decision on *Adarand* case was upheld by a narrow margin of five-to-four vote in favor of the conservatives. Therefore, the Court's decision on "strict scrutiny" stands on somewhat shaky grounds. Any slight unbalance of the delicate conservative-to-liberal Supreme Judge ratio may easily tip the scale back and forth between the "strict scrutiny" and "intermediate scrutiny." This is another reason for not recommending sweeping changes.

The Small Business Administration's 8(a) Program also proved to be much more durable than many experts had expected. Despite the barrage of post-*Adarand* court challenges and GAO's report of wide misuse and abuse of the program, which all seemed to forecast an inevitable doom for the 8(a) Program, the program somehow managed to survive thus far and continues to receive support from both the Clinton Administration and the Department of Justice. However, continuous efforts by non-minority contractors challenging the constitutionality of the 8(a) Program and other remaining set-aside programs are expected, unless another major court decision reverses the trend set in the *Adarand* case.

Set-aside programs, like welfare or other Government transfer programs, redistribute contracts and resources. Likewise, the 8(a) Program steers public resources to minority businesses but appears to do little to develop the skills that would allow them to prosper after the graduation from the program. A report by the General Accounting

Office in March 1996 has shown that the longer companies stay in an SBA's 8(a) set-aside program, which is designed to develop the minority business enterprises, the less likely they are to develop outside business that would sustain them when they no longer get non-competitive Government contracts (England, 1995, p. 2).

What is more ironic is that despite the suspension of DoD's "rule of two" program, the SBA's 8(a) Program still remains intact. Although the 8(a) Program is a set-aside program and in all reality indistinguishable from the "rule of two," it is not receiving as much scrutiny as the "rule of two" since it is also dubbed as Minority Small Business and Capital Ownership Development (MSB/COD) Program (i.e., it receives its protection as being referred to as a "social program" designed to "foster the development of minority firms and thereby increasing the likelihood of their success in the Nation's economic mainstream").

Instead of streamlining programs and policies, inter- and intra-party competition have created multiple programs (e.g., Labor Surplus Act Preference, HUBZone, Empowerment Contracting, 8(a), Price Bid Preference and Evaluation Credit), making them difficult to distinguish and coordinate. Furthermore, the lack of coordination and guidelines, ever-changing policies, and widely scattered non-standardized definitions are prompting each agency to take initiative to develop its own uniquely tailored policies and programs, which in some ways adds to the complexity of a delicately intertwined web of information.

In view of the transitory social, political and judicial climate, it would be more

appropriate to choose a path that would provide a gradual transition away from the race-conscious programs and maintain vigilant assessment of the impact that changes would bring upon the minority and women-owned concerns and upon the society as a whole. Meanwhile, new moderate initiatives such as the HUBZone Act or Empowerment Contracting may be phased in to soften the impact caused by the transition and birth pain.

Although not much result can yet be seen from DoD's Industry Thrust Program, which is still in its honeymoon stage, continuous effort to reach out to minority and women-owned concerns and make them aware of business opportunities may also help alleviate some of the initial impact caused during the transitional phase. Such programs are well supported by both Republicans and Democrats alike.

Finally, it is difficult to state objectively which single proposal would be most constitutional and best serve the public as a whole. Each program appears to have some merit of its own; exhibiting both desirable and undesirable attributes. Combining the most desirable attributes of various proposed programs into a well-orchestrated single legislative package seems to be the most logical and effective way to navigate through the tortuous route. However, even after a well-conceived/coordinated proposal is adopted, the SDB programs will most likely continue to undergo changes to fit the ever-changing social-political environment, evolutionary Judicial interpretation and the needs of the general public.

### C. RECOMMENDATIONS

Neither political party denies that discrimination still exists and poorly structured group preferences are the wrong remedy, resulting in more discrimination. Therefore, the following recommendations may be helpful if the politicians, lawmakers and special interest groups would "set aside" their self-interest and "bargaining chips" and adopt a mechanism that is most race-neutral and gender-neutral and, at the same time, constitutionally sound and can be supported by census/commerce statistics and poverty index.

1. Abolish any unsubstantiated race and gender-based goals and quota. The statutory requirement establishing Government-wide goals of awarding five percent of total Federal prime and subcontracts to minority concerns, under the Small Business Act's Section 15(g)(1), appears to be inconsistent and contradictory to President Clinton's commitment to do away with any program that "creates quota." Five percent is a so-called "goal." Nevertheless, in all reality, it is no different from a "quota," set-aside for the minority groups. If so, the five-percent requirement for women-owned business concerns would also have to be reformed, as well as the Section 1207 of the Fiscal Year 1987 Defense Authorization Act, 10 USC 2301, which also requires five percent of DoD contracts be awarded to minority business concerns. Despite delicate terminology gamesmanship displayed by some of the key Federal agencies (such as the Department of Labor), the Government-wide "goal" of five percent for minority groups is analytically indistinguishable from setting aside a Government-wide "quota" of five percent for

minority groups. Either the Section 15(g)(1) will have to be reformed or the President will need to clarify his statement. Essentially, a similar measure used in DOJ's benchmarks test may be used as a new measuring stick to substitute for the five-percent goal, i.e., use the level of minority contracting that one would reasonably expect to find in a market, which is calculated using the number of minority SDBs available and qualified to perform Federal contracts based on the data from the Census Bureau and Commerce Department.

2. Redefine and standardize the terms "small disadvantaged business" and "socially disadvantaged." An effort to redefine the term *economically disadvantaged* under the definition of small and disadvantaged business (SDB) has been seen, yet no serious effort to redefine the term *socially disadvantaged* has emerged. Ultimately, it is recommended that in order to comply with *the Adarand* decision and constitutional standards, the widely used definition of SDB would have to be redefined to eliminate the racial connotation. In short, SDB is presently defined as a small business concern that is at least 51 percent unconditionally owned and controlled by a citizen or citizens of United States who are both *socially and economically* disadvantaged.

The controversy is centered around the definition of *socially disadvantaged*, which automatically qualifies designated minority groups as *socially disadvantaged* and excludes non-minority groups. Eliminating the racial factor and placing greater emphasis on narrowly defined race and gender-neutral *socioeconomic disadvantage* (e.g., using demographics and areas with poverty indexes or definition similar to HUBZone, in addition to using the existing definition of economic disadvantage) would provide the



most neutral position, generate least controversy and uphold the Fifth and Fourteenth Amendments.

There is also a fundamental fallacy underlying the phrase "51-percent owned and controlled by minority." That is, what if a firm is owned and controlled by a non-minority, yet the firm is actively involved in hiring a large percentage of minority and/or is extremely proactive in awarding subcontracts to minority and women enterprises. On the contrary, minority owned firms may not be pursuing the same socioeconomic objectives as in the previous case. The definition of "small business concern located in a HUBZone" under the HUBZone Act seems to deal with this very sensitive issue and provides the most neutral answer.

Finally, once the definition is streamlined and redefined, an effort should be made to standardize and consolidate the definition throughout the Federal agencies. Presently, the definition of SDB is widely scattered in various publications, such as section 8(a) and 8(d) of the Small Business Act, the Federal Acquisition Regulation, and each agency's regulations. Because of the absence of a standardized/uniform definition and the lack of guidelines created by political competition, every agency appears to have taken initiatives to provide its own interpretation of the term. Amidst the confusion, and quite understandably, some of the contract references such as the *Government Contract Guidebook* no longer attempts, at least for now, to define the term *socially and economically disadvantaged* (Arnavas, 1995).

3. Implement the HUBZone Act as the primary mechanism to preserve the truly

disadvantaged small businesses. The HUBZone Act is recommended over Empowerment Contracting since it sets progressive race and gender-neutral goals for the first four years of implementation phase and in the subsequent years. As already proposed in the HUBZone Act, let the Small Business Administration manage this program, and let the small business concern located in a HUBZone take precedence over the supplemental 8(a) and minority set-aside programs.

4. Abolish the primary use of the 8(a) Program as proposed by Representative Jan Meyer. The SBA's 8(a) Program, despite being protected by DOJ as a constitutionally valid program, is analytically indistinguishable from the already suspended DoD's "rule of two" program, other than being tagged as a "business development program." Therefore, the use of 8(a) Program should be limited only under the recommendation number five stated below.

5. Implement DOJ's recent proposal as a supplementary program to the HUBZone Act. In other words, permit the use of the 8(a) Program, ten-percent bid preference and prime contractor evaluation credit only when the "benchmark limits" test fails. The current definition of "socially and economically disadvantaged" should apply to both the 8(a) and "ten-percent bid preference" under these circumstances only (i.e., only when the "benchmark limits" test fails). Under this criterion, the presently suspended DoD SDB Set-aside Program may even be allowed to return, again only as a supplemental program. DOJ should equitably apply the "benchmark limits" test to women-owned business as well.

6. Suspend the Equal Opportunity Act of 1996. The bill should be held off for now because it entirely bans the use of 8(a), ten-percent bid preference or any set-aside programs. The bill as it stands now does not permit the use of any of these set-aside programs even as supplemental programs to make up for the shortages proven by benchmark limits test. While this legislative proposal provides some sound recommendations and may technically meet the Constitutional standards of the Fifth and Fourteenth Amendments, it appears that time is "not ripe" to implement such sudden, sweeping changes. The bill could be revisited in the long-term future when all the evidence proves that the time has come.

7. Promote outreach programs such as DoD's Industry Thrust Program. Continuous effort on behalf of Federal agencies to reach out to minority and women-owned business concerns of Government contract opportunities is essential in mitigating a possible undesirable impact during the arduous transitional period.

The proposed seven recommendations would be the most ideal and logical ways to meet the standards set forth in the *Adarand* decision, as well as upholding the Constitutional standards. It also happens to be consistent with President Clinton's view of "mending but not ending," by limiting the use of quotas only under specific proven circumstances (e.g., when the benchmark test fails) and, in the process, it may minimize the cases of reverse-discrimination and equitably distribute the federal resources to the genuinely needy. Based on the macroscopic view of trends in affirmative action and SDB programs, this is as close as it can come to a race and gender-neutral position, without

entirely dismantling the affirmative action program for now.

The recommendations limit the use of set-aside programs only to circumstances and areas where “reasonable” discrimination can be proven using a statistical disparate impact study. The statistical disparity study may not always and entirely be accurate in proving the actual/past discrimination and proving unequitable distribution, yet it appears to be the best tool available for now for measuring the disparity of minority and women contracting in the sectors of society and industries. Ultimately, the set-aside would be based on truly socioeconomic disadvantage, rather than based on racial, ethnic or gender characters.

Since changing bits and pieces of currently proposed legislation may be difficult, a single legislative proposal combining all of the above ideas may be proposed. Thus, newly established Federal standards would most likely set the tone for the state and local governments to follow.

Again, complete abolishment of affirmative action (i.e., sudden and drastic elimination of all set-aside programs) could further divide this country along racial lines. Likewise, maintaining the affirmative action in its pre-*Adarand* form, especially in light of growing reverse-discrimination cases in employment, college admission and contracting, would also divide the nation. Finding a “neutral territory” that best serves the American public, through streamlining and maintaining a moderate form of affirmative action in Federal contracting, would be the most wise policy.

#### **D. AREAS FOR FURTHER RESEARCH**

1. It is still premature to measure the actual impact of the suspension of DoD's "rule of two" program. The statistics and results of the impact would most likely be released in early 1997. Therefore, another similar study that analyzes the changes and trends of Small Disadvantaged Businesses in Federal contracting is recommended in 1997.

2. Accordingly, it is recommended that this study be repeated every two years to incorporate the on-going changes, court decisions and trends of SDBs and, at the same time, conducting impact studies of newly implemented programs to monitor and assess the program's effectiveness.



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